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Case No: **CL-2024-000236**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Released for publication

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 February 2025

Before :

The Hon. Mr Justice Bryan

- -

Between :

THE REPUBLIC OF KAZAKHSTAN **Claimant**

- and –

(1) WORLD WIDE MINERALS LTD (a company incorporated in Canada)
(2) The estate of PAUL A CARROLL QC (deceased)
(3) CATHARINE CARROLL as executor of the estate of PAUL A CARROLL

Defendants

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Christopher Harris K.C. and **Paul Choon Kiat Wee**
(instructed by **Reed Smith LLP**) for the **Claimant**
Philip Edey K.C. and **Edward Ho** (instructed by **Jones Day**) for the **Defendants**

Hearing dates: 28 and 29 January 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BRYAN:

A. INTRODUCTION

1. This is an application by the Claimant, the Republic of Kazakhstan ("Kazakhstan"), under section 68(2)(d) of the Arbitration Act 1996 (the "Arbitration Act") challenging operative paragraphs of an award (the "Award") rendered on 26 March 2024 by Sir Franklin Berman and Professor John Crook (the "Tribunal") in an UNCITRAL arbitration in relation to causation and loss in a long-running Investor-State arbitration seated in London, on the ground of serious irregularity, on the basis that the Tribunal failed to deal with all the issues that were remitted back to it (following a previous successful section 68 challenge by Kazakhstan under section 68(2)(a)) and that this has caused Kazakhstan substantial injustice.

2. In short, Kazakhstan alleges that the Tribunal failed to deal with Kazakhstan's central argument on causation and loss at the remitted hearing, which would (per Kazakhstan's case) have provided a complete defence to the claim, with the result that the Defendants, World Wide Minerals Ltd ("WWM") and its CEO, President and shareholder Mr Paul A Carroll QC (jointly, the "WWM Parties") would have suffered no loss (whereas the Tribunal in fact found that Kazakhstan was liable to the WWM Parties in an amount of some US$13.7 million, which together with interest, stood at over US$54.5 million by September 2020).

3. In this regard, Kazakhstan had previously successfully challenged the "Final Award on Merits" (the "2019 Award") of the full tribunal (which then included Professor Park as chair) (the "Full Tribunal"), under section 68(2)(a) (the "First Section 68 Challenge") on the ground of serious irregularity. The serious irregularity was that the Tribunal had awarded damages on a basis that had not been argued by the WWM Parties, and which Kazakhstan had therefore not had the opportunity to address. That basis of damages was as to WWM's "sunk costs". His Honour Judge Pelling QC (sitting as a Judge of the Commercial Court) found that there was a serious irregularity in such circumstances and remitted issues of causation and loss to the Full Tribunal (see *The Republic of Kazakhstan v World Wide Minerals Limited* [2020] EWHC 3068 (Comm); [2021] 1 Lloyd's Rep. 593 (the "Pelling Judgment")).

4. This challenge, therefore, concerns the Tribunal's second attempt to analyse and address the issues of causation and loss based on the evidence and arguments placed before them on the remitted hearing which, following extensive written submissions by the parties, culminated in a five day oral hearing at which expert witnesses were called and further oral submissions were made by the parties, including as to the key issue of whether a (limited) breach by Kazakhstan (referred to as the "Export License Breach") was in fact a cause of the demise of WWM's investment at all since (per Kazakhstan's counterfactual case) even but for the Export License Breach the relevant agreement (the Management Agreement) would still have been terminated by Kazakhstan for WWM's failure to make payments thereunder, and WWM's investment would have been lost in any event, with the result that WWM suffered no loss (the "Counterfactual Case").

5. Kazakhstan submits that this key issue was simply not dealt with by the Tribunal in its Award and accordingly its section 68 challenge must succeed. For its part WWM accepts (1) that the Counterfactual Case was put by Kazakhstan, at length, to the Tribunal and (2)

that if the Court concludes that in addressing causation, the Tribunal "completely overlooks"/"entirely ignores" the Counterfactual Case, there will be substantial injustice to Kazakhstan within the meaning of section 68, with the result that Kazakhstan's section 68 challenge would succeed. However WWM submits that the Tribunal did deal with this key issue (however briefly and however inferentially), and as such the section 68 challenge should be dismissed.

6. Accordingly, the difference between the parties could not be more stark. In the context of such difference it will be necessary to consider the Award, which runs to some 174 pages and 427 paragraphs, in some detail. I would only note at the outset that having set out its "route-map" as to how causation should properly be determined (at paragraph 268 of the Award) in terms which are unobjectionable, the Tribunal then either (per WWM) dealt with causation and the Counterfactual Case in a single operative paragraph (paragraph 293) or (per Kazakhstan) simply did not deal with the key issue at all. What is indisputable (and was candidly acknowledged by Mr Edey KC on WWM's behalf at the hearing) is that the argument that there was no loss because the Management Agreement would have been terminated in any event is not, in terms, referred to anywhere in the Award, and Kazakhstan says it is not in fact dealt with at all by the Tribunal. Equally, there is no record in the Award of the matters that Kazakhstan relied upon in relation to the Counterfactual Case including in its extensive written submissions, and at the oral hearing that took place over 5 days and involved evidence as to Kazakh law, and from the parties' respective accountancy experts and uranium experts, so far as they related to the Counterfactual Case, still less any findings or determinations in relation to the same. It is, on any view, a remarkable state of affairs.

7. I address the applicable principles in relation to a challenge under section 68 of the Arbitration Act in due course below, but it is apposite to bear in mind at the outset, and throughout, that, as was said by Akenhead J in *Secretary of State for the Home Department v Raytheon Systems Limited ("Raytheon")* [2014] EWHC 4375 (TCC) at [33]:

> "(a) Section 68 reflects "the internationally accepted view that the Court should be able to correct serious failures to comply with the "due process" of arbitral proceedings: cf art 34 of the Model Law." (see *Lesotho Highlands Development Authority v Impregilo SpA [2005] UKHL 43*, Paragraph 27); relief under Section 68 will be appropriate only where the tribunal has gone so wrong in the conduct of the arbitration that "justice calls out for it to be corrected." (ibid)".

B. BACKGROUND

8. Turning to the facts underlying the dispute and procedural events to date. The underlying facts date back to June 1996, when WWM (which Kazakhstan characterised as a start-up and under capitalised junior mining company) won a tender to manage and acquire a uranium processing facility in Stepnogorsk, Kazakhstan owned by "TGK", a state-owned company that held several uranium deposits in Northern Kazakhstan as well as the uranium processing facility itself (which has been described as a "basket case").

9. The WWM Parties managed TGK under the terms of a management agreement (the "Management Agreement"). Under the Management Agreement WWM had various

financial obligations, as well as rights to certain uranium deposits (the "Northern Mines"), which WWM had itself identified as "uneconomic". In order to capitalise TGK, WWM extended loans of US$12.7 million to it, which were secured by a pledge over all of TGK's major assets.

10. WWM attempted to secure additional rights from the Government of Kazakhstan (including, per Kazakhstan, by deliberately starving TGK of funds which it was said put the lives of thousands of people at risk over the cold winter of 1996/1997).

11. To sell uranium mined in Kazakhstan on the international market, an export license from the Kazakh authorities was necessary. In early 1997, WWM applied to the Kazakh authorities for a license to export some of TGK's uranium oxide to the USA (so it could fulfil a contract with Consumers Energy, a utility company in the USA). No license was granted. In due course WWM claimed that the treatment of its application breached Kazakhstan's fair and equitable treatment ("FET") obligation under the Agreement between the Government of Canada and the Government of the USSR for the Promotion and Reciprocal Protection of Investments concluded on 20 November 1989 ("the Treaty"), a breach defined by the parties as the "Export License Breach".

12. In August 1997 Kazakhstan terminated the Management Agreement due to WWM's repeated, and continuing, failure to make payments required of it under the Management Agreement (in due course its right to do so was upheld by the Full Tribunal in the 2019 Award).

13. In this regard, in 2013, the WWM Parties commenced a London-seated Investor-State arbitration (the "Arbitration") against Kazakhstan in which they contended that WWM had possessed a much-expanded range of rights, and that it had lost them due to multiple breaches by Kazakhstan of the Bilateral Investment Treaty (including the Export License Breach). The WWM Parties asserted a single monolithic damages claim of US$1.914 billion. It is important to note at the outset that that claim was governed by international law and not, for example, English law.

14. On 19 October 2015, the Full Tribunal produced a partial award on jurisdiction deciding it had jurisdiction pursuant to the Canada-USSR Treaty (following a jurisdictional challenge by Kazakhstan which argued, unsuccessfully, that Russia not Kazakhstan was the successor party to the Canada-USSR Bilateral Treaty (the "Treaty")). In 2018, Kazakhstan sought to challenge that award out of time under section 67 of the Arbitration Act. That challenge attempt failed at first instance and permission to appeal was refused by the Court of Appeal.

15. After the Full Tribunal had rejected Kazakhstan's challenge to its jurisdiction, the WWM Parties' claims were heard and determined by the Full Tribunal. On 29 October 2019, the Full Tribunal rendered the 2019 Award in which, amongst other matters, it:

    (1) Rejected all but two of the WWM Parties' allegations of breach, and found that Kazakhstan's termination of WWM's Management Agreement had <u>not</u> breached the Treaty.

    (2) Held that Kazakhstan had breached the Treaty in two (narrow) respects:

(i) First, in its treatment of WWM's application for an export license in relation to the uranium sales contract with Consumers Energy (the "CE Contract") (i.e. the Export License Breach).

(ii) Second, in not ensuring that WWM was given timely notice of TGK's bankruptcy (the "Bankruptcy Breach").

(3) Proceeded to construct a theory of causation and loss with respect to the Export License Breach and the Bankruptcy Breach, not argued by the parties, and awarded compensation to the WWM Parties on this basis in the principal sum of US$13.7 million as at the date of breach (which, together with interest, stood at approximately US$54.5 million by September 2020).

16. As already foreshadowed, the Claimant challenged the 2019 Award under section 68(2)(a). The WWM Parties had never identified what loss flowed from each of the specific breaches it alleged and instead had only advanced a single case on the overall effect of all the breaches taken together. Since only the Export License and Bankruptcy Breaches were established, and the rest were rejected, Kazakhstan had not had the chance to address the losses, if any, which those specific breaches had caused.

17. As already noted, that challenge succeeded before HHJ Pelling QC (sitting as a Judge of the Commercial Court). He held that that irregularity had caused Kazakhstan substantial injustice because had Kazakhstan had that opportunity, the Full Tribunal might have reached a different conclusion on causation and damages. In particular, the Judge observed that the Claimant had not had the opportunity of persuading the Full Tribunal that the WWM Parties' loss would have been suffered in any event (i.e. Kazakhstan's Counterfactual Case), stating at [53] as follows:

> "53… in considering the causation issue, it would be necessary for WWM to prove what loss had been caused on the basis of the findings made by the Tribunal in relation to breach including in particular that WWM did not have any rights to the Southern Mines and [that Kazakhstan] was entitled to terminate the Management Agreement. Had this exercise been carried out the Tribunal might well have reached a different conclusion from that it reached in paragraph 587 of the Award …. That WWM did not have any rights in relation to the Southern Mines may well have a substantial impact given that it was WWM's own case that without access to the Southern Mines the whole project was fundamentally loss making. It may well have been loss making whether or not the export license sought had been granted as and when it should have been granted".

18. HHJ Pelling QC therefore set aside paragraphs 587, 596-601 and 649 of the 2019 Award which related to the quantification of loss and remitted the determination of all issues concerning causation and quantification to the Full Tribunal. He also set aside and remitted to the Full Tribunal paragraphs 631-644(i) and 650 of the 2019 Award for reconsideration of the costs payable (if any) by Kazakhstan to WWM.

19. A further phase of the Arbitration (the "Remitted Proceedings") then followed. During the initial phase of the Remitted Proceedings Kazakhstan and WWM served extensive written submissions on causation and loss. This was followed by a five day oral hearing before the Full Tribunal between 11 and 15 July 2022 to address causation and quantum, at which the parties called oral expert evidence (on Kazakh law, accountancy issues, and uranium issues), much of which was directed at the Counterfactual Case (as is common ground).

20. After the evidentiary hearing in July 2022, the Presiding Arbitrator resigned due to ill-health in March 2023, and the parties agreed that the proceedings would continue with the two remaining arbitrators only (the "Tribunal").

21. On 26 March 2024, the Tribunal rendered the Award. In the disposition part of the Award (at [427]) it determined (amongst other matters including as to costs):

    (1) That "The [Export License Breach] constituted a decisive factor that, together with others, caused the eventual demise of [WWM's] investment in Kazakhstan".
    (2) "The above breach, as a breach of the guarantee under [Bilateral Investment Treaty] of fair and equal treatment for [WWM's] investment in Kazakhstan, is reasonably and appropriately compensated by the award to [WWM] of their sunk costs, assessed for the purpose in the amount of US$13.7 million".
    (3) That in the light of (1) and (2) WWM's "claims in respect of the [Bankruptcy Breach] became moot".
    (4) "All other claims are rejected".

22. On 23 April 2024 Kazakhstan issued its Arbitration Claim Form and Accompanying Schedule challenging the Award under section 68(2)(d) of the Arbitration Act on the basis that:

    (1) In rendering the Award, the Tribunal failed to deal with a key issue that was put to it, namely:

        Kazakhstan's contention that the Export License Breach was not a cause of the demise of WWM's investment at all (i.e. not even one of a number of multiple causes), since even but for the Export License Breach, the Management Agreement would still have been terminated and the Arbitration Claimants' investment in TGK would still have been lost in any event, and

    (2) This constituted a serious irregularity within the meaning of section 68(2)(d) of the Act, causing substantial injustice to Kazakhstan.

23. On 24 May 2024, WWM's solicitors Jones Day (of its own motion) wrote to Kazakhstan's solicitors Reed Smith LLP stating, amongst other matters as follows:-

> "We refer to the Republic of Kazakhstan's **(**"Kazakhstan") challenge, pursuant to section 68(2)(d) of the Arbitration Act 1996 (the "Challenge"**),** to the award issued on 26 March 2024 in the above-referenced matter (the "Award"**).**
>
> Having now had the opportunity to review the Challenge in detail, we believe Kazakhstan's arguments are wholly without

> merit and are prepared, should this prove necessary, to fully defend our clients against Kazakhstan's claims. This said, given that this matter has been pending for over a decade (having started in December 2013 when World Wide Minerals Ltd. 's Notice of Arbitration was filed), and in the interests of the swift resolution of the dispute, our clients are prepared to attempt to reach agreement with Kazakhstan on next steps.
>
> With this objective in mind, we write to propose that the Parties jointly agree that the Court grant the alternative relief sought by Kazakhstan at paragraphs 24(l)(b) and 24(2)(b) of its Arbitration Claim Form Schedule and that the issues listed therein be remitted to the Truncated Tribunal for reconsideration and rendering a fresh award as soon as possible but no later than within 3 months, as provided in section 71(3) of the Arbitration Act 1996. Upon such remission, we do not envisage any new submissions nor any further hearing being necessary (consistent with Kazakhstan's position that it has already raised such matters).
>
> Should your client be amenable to this proposal, the Parties should commence work on a Consent Order at the earliest possible opportunity. We would be pleased to send through a draft of such Order for your review shortly upon receipt of your confirmation that our clients' proposal is, in principle, agreed.
>
> This proposal is put forward, and any subsequent discussions will be, without prejudice to the respective Parties' positions in relation to the Challenge (and until any agreed Consent Order has been signed and sealed by the Court). Our clients do, however, reserve the right to rely on this correspondence in relation to the issue of costs in the context of the Challenge.
>
> We will, separately, be writing to the Truncated Tribunal to confirm whether they would also be ready and willing to determine any matters remitted back to them within 3 months of the remission. We will, of course, copy you on that communication".

24. The same day (and without awaiting any response from Reed Smith LLP on behalf of Kazakhstan) Jones Day wrote to the Tribunal in similar terms, and ended their letter by stating:

> "In light of the Parties' pending deadlines before the Court we are therefore writing to ask the Tribunal whether, should it prove possible for the Parties to reach agreement on the basis outlined above, the Truncated Tribunal would, for its part, be willing and available to address Kazakhstan's requests for reconsideration within the above-stated statutory deadlines".

25. By letters dated 27 and 28 May 2024 respectively, the members of the Tribunal each indicated that they would be unable to accept any further assignment in this matter.

C. THE ISSUE

26. On the challenge under section 68(2)(d) of the Arbitration Act, the issue that arises is whether the Tribunal failed to deal with Kazakhstan's Counterfactual Case, namely:

> "whether the Export License Breach was in fact a cause of the demise of WWM's investment at all, since even but for the Export License Breach, the Management Agreement would still have been terminated and WWM's investment in TGK would still have been lost in any event".

27. The question whether there is a serious irregularity within subsection 68(2)(d) raises three specific questions (*Petrochemical Industries Co (KSC) v DOW Chemical CO* [2012] EWHC 2739 (Comm) [2012] 2 Lloyd's Rep. 691) at [15]:

    (1) Whether there was an "issue" within the meaning of the subsection?

    (2) If so, was it "put to" the Tribunal?

    (3) Did the Tribunal fail to "deal with" it?

28. If the answer to all these questions is in the affirmative, a further issue is whether such failure of the Tribunal to deal with the Counterfactual Case caused or will cause Kazakhstan substantial injustice.

29. By way of riposte to the section 68 challenge, WWM says that such challenge is precluded because if, contrary to WWM's case, there is any real doubt about whether the Tribunal dealt with the Counterfactual Case, Kazakhstan could and should have applied to the Tribunal under Article 35 of the UNCITRAL Rules 1976 (under which the Remitted Proceedings were conducted) for an interpretation of paragraph 293 of the Award to clarify what WWM says is, on this hypothesis, an ambiguity in the Award. For its part Kazakhstan submits that Article 35 of the UNCITRAL Rules 1976 is not engaged as there is no "ambiguity" and no issue of "interpretation" that arises in circumstances where there was a wholesale failure by the Tribunal to deal with the Counterfactual Case (relying in that regard on the analysis of Foxton J in *Czech Republic v Diag Human SE* ("*Diag*") [2024] EWHC 503 (Comm) at [206] and following).

D. THE APPLICABLE LEGAL PRINCIPLES

D.1 Serious Irregularity

30. Section 68 of the Arbitration Act provides, amongst other matters, that:

> "(1) A party to arbitral proceedings may … apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> …
>
> (d) failure by the tribunal to deal with all the issues that were put to it".

31. The applicable principles are well established, and were largely common ground between the parties, albeit that there were differences of emphasis between Kazakhstan and WWM.

32. In *Diag*, Foxton J restated the principles summarised by the Privy Council in *RAV Bahamas Ltd v Therapy Beach Club ("RAV Bahamas")* [2021] UKPC 8, [2021] AC 907 (in which Lord Hamblen and Lord Burrows JJSC handing down the judgment of the Board themselves approved what was said by Aikenhead J in *Raytheon*).

33. In this regard Foxton J stated at [160] (references are to paragraphs in *RAV Bahamas*):

> "i) The test of serious irregularity was intended to limit intervention to "extreme" cases where it could be said that "the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected" ([30]).
>
> ii) Serious irregularity has been recognised as imposing a "high threshold" or as "the hurdle" ([31]).
>
> iii) The focus is on due process, not the correctness of the decision reached ([32]).
>
> iv) Even if a case is shown to fall within one or more of the kinds of irregularities listed in section 68 this will only amount to a serious irregularity if the court considers that it "has caused or will cause substantial injustice", which means "more than some injustice" ([33]).
>
> v) There will be substantial injustice where it is established that, had the irregularity not occurred, the outcome of the arbitration might well have been different, but it is not necessary to show that the outcome would "necessarily or even probably be different" ([34]).
>
> vi) Some irregularities may be so serious that substantial justice is "inherently likely" or "likely in the very nature of things" to result ([35]), including where "on a central matter a finding is made on a basis which does not reflect the case which the party

> complaining reasonably thought he was meeting, or a finding is ambiguous, or an important issue is not addressed."
>
> vii) In general, there will, however, be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity ([37])".

34. In relation to the meaning of an "issue", the applicable principles are again identified by the Board in *RAV Bahamas* by reference to what was said by Akenhead J in *Raytheon* at [33(g)]):

> "(ii) There is a distinction to be drawn between 'issues' on the one hand and 'arguments', 'points', 'lines of reasoning' or 'steps' in an argument, although it can be difficult to decide quite where the line demarking issues from arguments falls. However, the authorities demonstrate a consistent concern that this question is approached so as to maintain a 'high threshold' that has been said to be required for establishing a serious irregularity (*Petrochemical Industries v Dow* [2012] 2 Lloyd's Rep 691, para 15; *Primera v Jiangsu* [2014] 1 Lloyd's Rep 255, para 7).
>
> (iii) While there is no expressed statutory requirement that the section 68(2)(d) issue must be 'essential', 'key' or 'crucial', a matter will constitute an 'issue' where the whole of the applicant's claim could have depended upon how it was resolved, such that 'fairness demanded' that the question be dealt with (*Petrochemical Industries*, at para 21).
>
> (iv) However, there will be a failure to deal with an 'issue' where the determination of that 'issue' is essential to the decision reached in the award (*World Trade Corpn v C Czarnikow Sugar Ltd* [2005] 1 Lloyd's Rep 422 at para 16). An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes (*Weldon Plan Ltd v The Commission for the New Towns* [2000] BLR 496 at para 21)".

35. Turning to whether the issue has been "put to" the tribunal, the Board in *RAV Bahamas* at [42] quoted what was said by Aikenhead J in *Raytheon* at [33(g)(v)] that "[t]he issue must have been put to the tribunal as an issue and in the same terms as is complained about in the section 68(2) application". The Board continued:

> "There is a degree of overlap between the considerations relevant to whether there is an "issue" and whether it has been "put to" to the tribunal. It is clear that this does not require the issue to have been pleaded or included in a list of issues. It is necessary to consider the arbitration proceedings as a whole, including the pleadings and the written and oral submissions.

> Having done so, in general, what is required is that the tribunal's attention has been sufficiently clearly drawn to the issue, as one which it is required to determine, that it would reasonably be expected to deal with it".

36. The Board then addressed the principles in relation to the third question, i.e. whether the arbitrators had failed to deal with the issue, quoting with approval what was said by Aikenhead J in *Raytheon* at [33(g)(vi) to (xii)]. The parties in the present case referred me to Foxton J's summary in relation to many of these matters at [163(vi) to (viii)] in *Diag,* which is as follows:

> "vi) If the tribunal has dealt with the issue in any way, section 68(2)(d) is inapplicable and that is the end of the enquiry; it does not matter for the purposes of section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently ([43]). It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length. A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue. Nor is a failure by a tribunal to set out each step by which it reached its conclusion or deal with each point made by a party a failure to deal with an issue that was put to it.
>
> vii) A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues ([43]).
>
> viii) Whether there has been a failure by the tribunal to deal with an essential issue involves a matter of a fair, commercial and commonsense reading (as opposed to a hypercritical or excessively syntactical reading) of the award in question in the factual context of what was argued or put to the tribunal by the parties (and where appropriate the evidence) ([43]).The court can consider the pleadings and the written and oral submissions of the parties to the tribunal in this regard".

37. It is important to note, however, that Foxton J did <u>not</u> summarise all the applicable principles in this regard that were identified by Aikenhead J in *Raytheon* at [33(g)] and quoted with approval by the Board in *RAV Bahamas* at [43]. In particular, his summary omits what was said by Aikenhead J in *Raytheon* at [33(g)(xi)] which was quoted with approval by the Board in *RAV Bahamas* at [43]. It may be that this passage was not considered by him to be of relevance on the facts in *Diag* but, as will be seen, it may be of some considerable importance on the facts of the present case:

> "(xi) It is up to the tribunal how to structure an award and how to address the essential issues; if the issue does not arise because of the route the tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will not be engaged. <u>However,</u>

> if the issue does arise by virtue of the route the Tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will be engaged".
>
> (emphasis added)

38. In relation to what issues need to be dealt with, the following passages from the judgment of Gavin Kealey QC (sitting as a Deputy High Court Judge) in *Buyuk Camlica v Progress Bulk Carriers ("Buyuk")* [2010] EWHC 442 (Comm) are, I consider, of relevance:

> "29. However, the principal issue (i.e. the very dispute that the Tribunal had to decide), whether or not the Charterers were entitled to damages, could not be decided fairly in this case unless the Tribunal also dealt with such issues as had been raised by the parties that were essential to be dealt with for the Tribunal to come fairly to its decision on that principal issue.
>
> …
>
> 30. … Provided that the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it should, in my view, have complied with the requirements of section 68(2)(d).
>
> …
>
> "38. … Nevertheless, it seems to me that the question whether or not the Tribunal failed to deal with an essential issue, *viz*. an issue that was crucial to the Tribunal's decision, cannot be decided on the basis of whether or not the issue has any merit: the presence or absence of merit might be relevant to whether or not a substantial injustice might have been done to one or other of the parties but it cannot resolve the question whether or not the issue was dealt with in the first instance. Having said that, what if the issue is one that is so devoid of merit that one might be able to contemplate the possibility that it was dismissed by the Tribunal which, given the quality of the issue in relation to the complexity of the case overall, did not then think it necessary to articulate as much in its Reasons? In my judgment, the answer to this question is that it should not be left to the parties, or the task of the court, to engage in speculation of that kind. If the determination of an issue is crucial to the result, as in these references waiver was crucial to the question whether there was an actionable breach of contractual warranty, then however unmeritorious the arguments might be in favour of that issue the Arbitral Tribunal is bound to deal with it and, in my view, to do so in such a way, normally by reference in the Award or Reasons, as to make it evident to the parties that the Tribunal has indeed dealt with it: as His Honour Judge Humphrey Lloyd Q.C.

observed in *Weldon Plant v Commission for New Towns* [2001] 1 All ER 264, 279:

> ".. where the decision cannot be justified as a particular key issue has not been decided which is crucial to the result .... the tribunal has not done what it was asked to do, namely to give the parties a decision on all issues necessary to resolve the dispute or disputes."

In a similar vein was the observation of Toulson J. in Ascot Commodities N.V. v Olam International Ltd. [2002] 2 Lloyd's Rep. 277, 284:

> "Nor is it incumbent on arbitrators to deal with every argument on every point raised. But an Award should deal, however, concisely, with all essential issues."

As those observations recognise, there should be some form of communication, normally in the form of a decision, by an arbitral tribunal to the parties from which the latter can ascertain whether or not an essential issue has dealt with. It is not sufficient for an arbitral tribunal to deal with crucial issues *in pectore*, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of section 68(2)(b) is to ensure that all those issues the determination of which are crucial to the tribunal's decision are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties (normally, as I say, from the Award or Reasons) that those crucial issues have indeed been determined".

(emphasis added)

39. Further, in relation to reading an award in a reasonable and commercial way, as was said by Andrew Smith J in *Petrochemical Industries Co (KSC) v Dow Chemical CO* [2012] EWHC 2739 (Comm) [2012] 2 Lloyd's Rep. 691) at [27(v)];:

> "(v) [the] approach may involve taking into account of the parties' submissions when deciding whether, properly understood, an award deals with an issue. Although submissions do not dictate how a tribunal is to structure the disposal of a dispute referred to it, often awards (like judgments) do respond to the parties' submissions and they are not to be interpreted in a vacuum".

D.2 Substantial injustice

40. As is provided in section 68(2), a serious irregularity is an irregularity which the court considers has caused or will cause substantial injustice to the applicant. In this regard, and as was said by Aikenhead J in *Raytheon* at [61]:

> "[i]t almost goes without saying that, necessarily, there has been substantial injustice because the arbitrators have not addressed the key issues … This cannot be classified as anything less than substantial injustice because the arbitrators have not applied their minds to the issue at all and any right minded party to arbitration would feel that justice had not been served".

41. In *RAV Bahamas* Lord Hamblen and Lord Burrows JJSC referred to the Report on the Arbitration Bill (later, the Arbitration Act) of the Departmental Advisory Committee on Arbitration Law (the "DAC") to emphasise that:

> "30. … it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, clause 68 is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected".
>
> (emphasis added)

42. They also noted at [35]:

> "35. Some irregularities may be so serious that substantial justice is "inherently likely" or "likely in the very nature of things" to result. As Toulson J stated in *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277, 284F—285A:
>
> > "Since the whole process of arbitration is intended as a way of determining points at issue, it is more likely to be a matter of serious irregularity if on a central matter a finding is made on a basis which does not reflect the case which the party complaining reasonably thought he was meeting, or a finding is ambiguous, or an important issue is not addressed, than if the complaints go simply to procedural matters . . ."
> >
> > It is *inherently likely* to be a source of serious injustice if irregularities occurred of the kind to which I have referred. Since the purpose of arbitration is to determine central issues between the parties, if there has been a flaw in that this has not been done, that is *likely in the very nature of things* to be a matter of serious injustice".
> >
> > (emphasis added)

43. A claimant will suffer substantial injustice if a tribunal has "entirely ignored" (*Petrochemical Industries Co (KSC) v Dow Chemical* at [33]), or "overlooked" (*Buyuk* at [38]), or "failed to deal with" (*Torch Offshore LLC v Cable Shipping Inc* [2004] 2 Lloyd's Rep 446 at [25]); or "disregard[ed]" important issues (*Russell on Arbitration*, 24th edn, para 20.30.17).

D.3 Article 35 UNCITRAL Rules 1976

44. The arbitration was conducted in accordance with the 1976 UNCITRAL Rules.

45. Article 35 thereof provides that:

> "1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.
>
> 2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply".

46. As already noted, section 68(1) of the Arbitration Act provides that a party to arbitral proceedings may apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award but that, "[a] party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)". In this regard section 70(2) provides:

> "An application or appeal may not be brought if the applicant or appellant has not first exhausted—
>
> (a) any available arbitral process of appeal or review, and
>
> (b) any available recourse under section 57 (correction of award or additional award)".

47. In *Diag,* Foxton J held that the materially identically worded Article 37 of the UNCITRAL Rules 2010 was "a comprehensive set of arbitration rules" ousting the default powers of the tribunal under section 57(3)) (see at [208(iv)]).

48. As for Article 37 itself, he stated at [200]-[201] as follows:

> "200. David Caron and Lee Caplan's commentary on the UNCITRAL Rules (*The UNCITRAL Arbitration Rules: A Commentary* 2nd, [802]) states "interpretation, as distinct from other post-award proceedings, provides a means of 'clarification of the award' by resolving any ambiguity and vagueness". They refer to the *travaux préparatoires* for the UNCITRAL Rules noting that the word "clarification" had at one stage been proposed, referring to certain observations from representatives that interpretation involved "clarification of 'the purpose of the award'" or was "useful in resolving confusion and ambiguity in

the wording of the award arising in cases where the award was not rendered in the native language of the parties". Caron and Caplan continue:

> "Interpretation is not a mechanism for revisiting an issue … that the tribunal should have decided but did not."

201. Other commentary also stresses the need for lack of clarity before an Article 37 request can be made: e.g. Thomas Webster, *Handbook of UNCITRAL Arbitration* (4th), [37-05] ("if the operative part is unclear") and [37-06] ("If the reasons are unclear in some respect, a party may wish to have an interpretation of the reasoning of the Award to determine the scope of any issues of res judicata"). The Claimants relied upon *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (2020) [851-22] when commenting on Article 33 of the UNCITRAL Model Law (which permits one arbitrating party with the agreement of the others to "request the arbitral tribunal to give an interpretation of a specific point or part of an award"). This commentary states:

> "There may be situations where a statement needs to be clarified, or it is uncertain whether some specific issues have been dealt with in the award or reserved for future determination.
>
> Interpretation can be used whenever the final award does not contain the minimum information necessary to grasp the tribunal's line of reasoning".

Once again, this commentary presupposes a genuine lack of clarity or "uncertainty", or an inability to "grasp" reasoning. I would note that the scope for abusive requests for interpretation under the UNCITRAL Model Law led to a requirement that both parties consent before it can be exercised (see the 329th meeting of the UNCIRAL Working Group on the UNCITRAL Model Law, on 18 June 1985 for discussion of this issue)".

(emphasis added)

49. Accordingly, Articles 35/37 of the UNCITRAL Rules 1976/2010 are not engaged where there is no "ambiguity", and no issue of "interpretation" arises in circumstances where there is a failure by a tribunal to deal with an issue (see *Diag* at [206] and following). Consistently, in that case, there was no issue of interpretation because the merits of the issue at hand (concerning an assignment point) were not referred to in the award and there was nothing in the award at all to reference to the assignment point.

E. THE RESPECTIVE SUBMISSIONS

50. In circumstances in which WWM concedes that the Counterfactual Case was "an issue", that it was "put to" the Tribunal, and that if the Tribunal "completely overlooked" the

Counterfactual Case Kazakhstan will have suffered substantial injustice, the main (and determinative) issue between the parties on the section 68 challenge is whether the Tribunal "dealt with" the Counterfactual Case. However on the authorities, that issue cannot be considered in a vacuum and without regard to the evidence and arguments before the Tribunal and the Award read as a whole. It will therefore be necessary to identify and address both the evidence and arguments before the Tribunal and the Award as a whole.

51. Kazakhstan's overarching submission is that the Tribunal did not, and clearly did not, deal with the Counterfactual Case at paragraph 293 of the Award (in particular, the one sentence therein on which WWM places so much reliance) or anywhere else in the Award. Kazakhstan submits that this was a serious failure to comply with the due process of the arbitral proceedings such that the Tribunal has gone so wrong in the conduct of the arbitration that justice calls out for it to be corrected. Kazakhstan submits that the omission was all the more serious as this was a central, if not the key, issue in the Remitted Proceedings, and Kazakhstan had advanced detailed and evidentially robust arguments in the Remitted Proceedings in its written submissions, in its evidence at the Oral Hearing, and in its oral submissions demonstrating that WWM's investment would have failed in any event but for the Export License Breach, not least because Kazakhstan would have terminated the Management Agreement for non-payment in any event. Kazakhstan submits that it is all the more surprising that the Tribunal failed even to refer to the Counterfactual Case (including that Kazakhstan would have terminated the Management Agreement in any event) given the obvious relevance of the same to causation and loss, which were matters that led HHJ Pelling QC to uphold the First Section 68 Challenge and remit the matter to the Tribunal in the first place.

52. In contrast, WWM's overarching submission is that the Tribunal did, at least implicitly, deal with the Counterfactual Case in paragraph 293 of the Award when read together with other associated paragraphs (in particular paragraphs 268, 417, 422 and 427) albeit that it realistically accepts that nowhere in the Award does the Tribunal expressly refer to Kazakhstan's argument that the Management Agreement would have been terminated in any event by Kazakhstan (which is an integral part of the Counterfactual Case). It nevertheless submits that there was no failure to deal with the Counterfactual Case. Mr Edey KC accepted, however, that if the Tribunal "completely overlooked" (and therefore did not deal) with the Counterfactual Case then there would be a substantial injustice within the meaning of section 68(2)(d).

53. Mr Edey KC referred to *Diag* at [163(viii)], and suggested that the Tribunal should be given the benefit of the doubt. He points out that a tribunal can deal with a point despite giving no reasons at all for it, and it can deal with a point by not deciding it at all because of a decision on a logically prior point (see *Petrochemical Industries v Dow Chemical*, supra, at 27(i) and (ii)). Mr Edey KC's overarching submission was that on a fair, commercial and common sense reading of the Award, the Tribunal did deal with Kazakhstan's Counterfactual Case however briefly or concisely, and however lacking in reasons in relation thereto.

54. On the case of each of Kazakhstan and WWM, two paragraphs of the Award are key; namely, paragraphs 268 and 293. I address each of them further in Section F below, but it is appropriate to identify the parties' respective submissions, and express some initial observations in relation thereto, so that they can be borne well in mind when considering the Award, and addressing the elements of the section 68(2)(d) test.

55. Paragraph 268 of the Award provides:

> "As to the Respondent's position, the Tribunal accepts that it may in appropriate cases be convenient to apply a counterfactual test to help determine the existence of injury and its cause, after which a remoteness test might be applied to distinguish between compensable damage and damage that is too remote. The Tribunal is not however persuaded that international law lays down as a fixed requirement a two-stage process consisting of those elements. The true position is, as the Tribunal has already remarked, that on standard principles it is the claimant who must prove, by appropriate evidence, the loss or damage for which it claims. That is best regarded as one single process which may, according to particular circumstances, involve considerations both of injury and its causation, and of proximity. Once a claimant has produced its evidence and presented the conclusions it draws from that, the respondent may of course set out to rebut them by whatever means it chooses, which may well include in an appropriate case a counterfactual analysis designed to question whether the alleged injury was in fact suffered, or whether it was in fact caused by the alleged breach. The adjudicator will then decide the issues in dispute on the basis of the evidence and argument presented. But, and especially in respect of alleged breaches of the FET guarantee, these are matters involving a measure of evaluation and assessment, and not the application of rigid rules".
>
> (emphasis added)

56. Kazakhstan submits that in paragraph 268 the Tribunal recognise the potential relevance of a counter-factual case, then correctly state the true position that the claimant (WWM) must prove its case with evidence as to the loss or damage it has suffered and the conclusions it draws therefrom after which a respondent may seek to rebut the same by whatever means it chooses, including, in an appropriate case, a counterfactual analysis designed to question whether the alleged injury was in fact suffered or whether it was in fact caused by the alleged breach (this being an appropriate case as Kazakhstan has indisputably raised the Counterfactual Case here) and then the adjudicator (here the Tribunal) "will decide the issues in dispute on the basis of the evidence and arguments presented" (which include the Counterfactual Case), which is the Tribunal's route map (the "Route Map") yet, says Kazakhstan, the Tribunal (in paragraph 293), simply did not do so, and did not deal with the Counterfactual Case at all.

57. In contrast, WWM submits that the first part of paragraph 268 involves a rejection of Kazakhstan's Counterfactual Case (as Mr Edey KC confirmed was its position in the course of oral argument). In this regard Mr Edey KC referred back to paragraph 262 of the Award where the Tribunal had stated that it was "not able to endorse either of" the parties' approaches under international law to causation (I address paragraph 262 of the Award in due course below).

58. However, as for the remainder of paragraph 268, and even after hearing extensive oral submissions from Mr Edey KC, it remains unclear to me what meaning and effect WWM gives to the remainder of paragraph 268, given that the Tribunal then correctly identifies and sets out the "true position" (and neither party suggests otherwise) and the Tribunal then rightly recognises that a respondent may seek to rebut the claimant's evidence and conclusions sought to be drawn by whatever means it chooses which may include a counterfactual analysis, and which Kazakhstan undoubtedly did with its Counterfactual Case. The Tribunal then said it would decide the issues in dispute on the basis of the evidence and arguments presented (i.e. the Route Map) which must *ex hypothesi* include the Counterfactual Case. The remaining (and central) issue is whether it did deal with the Counterfactual Case at paragraph 293.

59. I can say at the outset that I consider that Kazakhstan's construction of paragraph 268 is the correct construction (both construing paragraph 268 *in situ* and in the context of the Award as a whole), and that WWM's construction is wrong and does not reflect what the Tribunal says, and finds. Most importantly, for the debate as to whether the Tribunal do deal with the Counterfactual Case (specifically at paragraph 293) the Tribunal does not reject the relevance of a counterfactual analysis or the Counterfactual Case in paragraph 268 and indeed (correctly) recognises that a respondent is entitled to raise a counterfactual analysis, which Kazakhstan of course did in its written submissions, in its evidence, and in its oral submissions at the five day oral hearing, and (importantly) the Tribunal made clear that it would then "decide the issues in dispute on the basis of the evidence and argument presented" (i.e. the Route Map). In this regard, and as will appear below, the "evidence and arguments presented" indisputably included the Counterfactual Case (indeed, and as accepted by Mr Edey KC, the Counterfactual Case was at the very heart of the evidence and Kazakhstan's case and was a major issue, if not the key issue, to be dealt with by the Tribunal). I address paragraph 268, which has five identifiable elements, in more detail in due course below.

60. I address the construction of paragraph 293 in due course below. It suffices at this point to identify, at a high level, the parties' respective submissions in relation thereto as to whether the Tribunal there dealt with the Counterfactual Case so that the same can be borne in mind when addressing the Award as a whole below.

61. For ease of reference the Counterfactual Case is as follows:

> "whether the Export License Breach was in fact a cause of the demise of WWM's investment at all, since even but for the Export License Breach, the Management Agreement would still have been terminated and WWM's investment in TGK would still have been lost in any event".

62. Paragraph 293 provides as follows (I include the lettering added by WWM for the purpose of discussion):

> "Reverting to paragraphs 234 and 271 above, **[A]** the Tribunal must now give its attention to the question, what injury was caused to the Claimants' investment in Kazakhstan by the export license breach? **[B]** It is incontestable that the export license breach cannot be found to be either factually or notionally a

> confiscation of the Claimants' investment. That would be incompatible with the Tribunal's res judicata finding that Respondent's termination of the Management Agreement was not in breach of the BIT, not to mention its finding of no expropriation (paragraph 9 above). **[C]** Nor is it open to question that Claimants' investment was already at serious risk of failure by the time of the export license breach. This is so whichever is taken to be the date of breach (see further, paragraphs 396-400 below). **[D]** The Parties vigorously disputed whether timely grant of an export license would have remedied this situation. **[E]** However, no license was in the event granted, making the failure by Respondent to respect the FET guarantee in its handling of Claimants' export license applications a decisive factor that, together with others, caused the investment's eventual demise. **[F]** As already laid down in paragraphs 244 and 268 above, the determination by the Tribunal of the injury and damage caused by this breach of the FET guarantee are matters involving a measure of evaluation and assessment, not the application of rigid rules. **[G]** On that foundation, the Tribunal will now consider afresh what remedy is warranted to redress the Claimants' injury, on the strength of the 'new and/or existing evidence of all issues concerning causation and the quantification of loss' as referred to in paragraph 2 of the High Court Order."
>
> (emphasis added)

63. Leaving aside the fact that it might be thought to be quite remarkable that in a 427 paragraph Award running to some 174 pages, the Tribunal addresses the question of causation and loss in one paragraph (paragraph 293), each of WWM and Kazakhstan place particular focus on one sentence therein (highlighted in bold at letter **[E]**) as to where, if at all, the Tribunal dealt with causation including the Counterfactual Case (albeit construed with regard to paragraph 293 as a whole and indeed the Award as a whole).

64. Kazakhstan's position is that the Tribunal clearly did not deal with the Counterfactual Case either in paragraph 293 or indeed, anywhere else in the Award. It points out that there is no reference to the factual matters that Kazakhstan relied upon, the disputed issues of Kazakh law that were addressed extensively by both parties in expert evidence (both in writing and in cross-examination at the July 2022 oral hearing), the extensive submissions of the parties' uranium experts which addressed (amongst other matters) whether WWM would have been able to fulfil the CE Contract, or the submissions of the parties' quantum experts addressing (amongst other matters) WWM's inability to fund TGK and satisfy its outstanding liabilities. Most fundamentally of all (and Kazakhstan says determinatively on the section 68(2)(d) challenge), the Tribunal simply do not deal at all with the issue of whether the Management Agreement would have been terminated in any event, which is at the very heart of the Counterfactual Case and which (if successful) would be fatal to WWM's claim for loss. Yet further, and far from there being any statement to the effect that the Tribunal did not consider it necessary to determine this issue, or that a determination of a logically anterior point meant the issue did not arise, the Tribunal has recognised at paragraph 268 that Kazakhstan was entitled to rebut causation by any means

it chose, including by a counterfactual analysis, and the Tribunal had then expressly chosen a route (the Route Map) by which it would "decide the issues in dispute on the basis of the evidence and the argument presented" (which *ex hypothesi* inevitably involved dealing with the Counterfactual Case) yet the Tribunal simply had not done so in paragraph 293 (or any where else in the Award).

65. As for the highlighted sentence on which WWM places so much reliance, namely, "no license was in the event granted, making the failure by Respondent to respect the FET guarantee in its handling of Claimants' export license applications a decisive factor that, together with others, caused the investment's eventual demise", Kazakhstan submits that this cannot possibly be construed as the Tribunal dealing with the Counterfactual Case. The words "no license was in the event granted" is simply a statement of the actual factual position (and indeed the basis for the Export License Breach itself). It is a given before one even considers the issues on causation that arose to be dealt with. This cannot make "the failure by the Respondent to respect the FET guarantee in its handling of Claimants export license" a factor, still less a "decisive factor", that caused the investment's eventual demise – that is the very issue the Tribunal are supposed to be dealing with, yet they do not do so in this sentence or anywhere else (not least given that the Tribunal has already (rightly) rejected WWM's case that it would suffice if the Export License Breach was a cause of the loss). "Together with the others" cannot be a reference to the Counterfactual Case as on that Counterfactual Case it is a trump card that would mean that WWM has suffered no loss (so it cannot be a factor "together with others" supporting WWM's loss), and equally if it was demonstrated it would be a "knock-out" blow to loss being suffered by WWM at all. Weighed in the scales it would, by its very nature, outweigh all other factors. In short, the Tribunal have failed to follow their own Route Map and have failed to deal with the Counterfactual Case.

66. In contrast WWM submits, as encapsulated at paragraph 8 of its Skeleton Argument, that,

> "it is plain beyond argument that [the Tribunal] did deal with the central issue 'whether the Export License Breach was in fact a cause of the demise of WWM's investment at all': at §293 of the [Award] the [Tribunal] held that the export license breach was 'a decisive factor that, together with others, caused the eventual demise of [WWM's] investment in Kazakhstan' and it repeated that critical conclusion in the Disposition at §427a".

67. I would simply interpose, at this point, that WWM's characterisation of "the central issue" omits a major part of the Counterfactual Case, namely "since even but for the Export License Breach, the Management Agreement would still have been terminated and WWM's investment in TGK would still have been lost in any event". Importantly, WWM accepted in the course of the oral argument that this part of the Counterfactual Case was part of the "issue" that was "put to" the Tribunal (as opposed to being a "sub-issue" which at one point WWM had sought to characterise it as). Further, per Kazakhstan, it was the key issue which in and of itself answered the first part of the Counterfactual Case but, per Kazakhstan, the Tribunal did not deal with.

68. As for paragraph 293 as a whole, WWM submits as follows:

(1) The Tribunal begins (at **[A]**) by correctly identifying the question it needed to answer. Having correctly identified the right question, a fair reading of the Award, in the context of the Award as a whole, is that the Tribunal had well in mind the arguments made by the parties concerning that question, in particular Kazakhstan's Counterfactual Case.

(2) The Tribunal then (at **[B]**) dismissed any suggestion that the Export License Breach was tantamount to the confiscation or expropriation of the WWM Parties' investment, and therefore that injury or causation could be assessed on that basis.

(3) Next, the Tribunal (at **[C]**) observed that even before the Export License Breach had occurred the "Claimants' investment was already at serious risk of failure". It submits that that observation was significant on the basis that the Tribunal recognised that the WWM Parties' investment was in a precarious position, and that was the starting point when considering whether the Export License Breach had caused its destruction (which it is said was very much the point raised by Kazakhstan's Counterfactual Case).

(4) That point is then built on in the sentence at **[D]**, which confirms that the Tribunal recognised that the parties disputed whether the timely grant of an export license would have remedied the serious risk of the WWM Parties' investment failing.

(5) At **[E]** the Tribunal expressed its conclusion on the critical causation question. It held that the Export License Breach was a "decisive factor that, together with others, caused the investment's demise". In the context of (including **[C]** and **[D]**) the reference to "others" WWM submits that this can only be a reference to factual matters relied on by Kazakhstan as part of its Counterfactual Case as to why (it said) the investment would have failed in any event (i.e. without the Export License Breach). WWM submits that the Tribunal thereby dealt with Kazakhstan's Counterfactual Case, rejecting Kazakhstan's case that those matters meant that causation was not established, and finding that while those matters (or some of them) were also causes of the failure, the Export License Breach was a decisive cause of the WWM Parties' injury.

(6) It is said that at **[F]** the Tribunal then provided some further explanation of its approach in reaching its conclusion at **[E]**. It is submitted that in referring back to paragraph 268 the Tribunal made clear that it had Kazakhstan's Counterfactual Case well in mind and was dealing with it to the extent it considered necessary in **[E]**, and that by reference back to paragraph 268 it was reiterating that causation was not to be determined by applying rigid rules and instead involved a measure of evaluation and assessment.

69. WWM then state "[n]o doubt [the Tribunal] might for completeness have said more about the factual aspect of [Kazakhstan's] Counterfactual Case" (which Kazakhstan would no doubt characterise as something of an understatement). WWM then submits, "[b]ut that is not a basis for a section 68 challenge. Rather all that matters is that the [Tribunal] dealt with it to the extent which, on its view of the proper approach to causation under international law, was necessary". Kazakhstan's riposte to this is that this is the whole point, in the sense that the Tribunal did not deal with it as required on the established authorities, and even more fundamentally on the facts of the present case, it had not dealt with it in the manner it had said it would in its Route Map at paragraph 268 ("on the basis of the evidence and argument presented") which is a fundamental aspect of due process, and which engages section 68(2)(d) (see *Raytheon* at [33(g)(xi)] and *RAV Bahamas* at [43]).

F. DISCUSSION

F.1 Agreed Matters

70. I turn then to consider the three specific questions that arise as to whether there was a serious irregularity within subsection 68(2)(d) (per *Petrochemical Industries Co (KSC) v Dow Chemical Co* supra [15]) namely, (1) whether there was an "issue" within the meaning of the subsection, if so, (2) was it "put to" the Tribunal, and if so (3) did the Tribunal fail to deal with it, before then considering the question of substantial injustice. As will be apparent, issues (1) and (2) can be dealt with relatively shortly given the concessions that have been made by WWM, whilst issue (3) requires a more detailed consideration of the Award as a whole, albeit that it is vital still to address (1) and (2) as they form the factual context in which (3) stands to be considered, and are highly relevant to how (3) has to be approached by a tribunal (given that the Counterfactual Case at (1) is recognised as a central, if not the key, issue to be dealt with in relation to causation and loss).

71. Before doing so it is important to identify that WWM made a number of important concessions (both in WWM's Skeleton Argument and in the course of Mr Edey KC's oral submissions) which significantly reduce what is in issue between the parties in relation whether there was a serious irregularity and whether it caused Kazakhstan substantial injustice:

    (1) WWM accepts that Kazakhstan's Counterfactual Case is an "issue" within the meaning of section 68(2)(d). During the course of his oral submissions Mr Edey KC expressly confirmed (when asked) that it was accepted that the whole of the Counterfactual Case was an "issue" (that is the words both before and after the word "since") i.e. "whether the Export License Breach was in fact a cause of the demise of WWM's investment at all" and "even but for the Export License Breach, the Management Agreement would still have been terminated and WWM's Investment in TGK would still have been lost in any event". This was a "rowing-back" from WWM's Skeleton Argument which had (wrongly) sought to "salami-slice" the words before and after the word "since" as an "issue" and "sub-issue".

    (2) Mr Edey KC accepted that the Counterfactual Case was regarded as a "very important" issue by Kazakhstan and indeed (in the words of Mr Edey KC) that it was "the centrepiece" of Kazakhstan's argument.

    (3) WWM accepts that the Counterfactual Case was "put" to the Tribunal, and that it was "put … at length" (WWM's Skeleton Argument paragraph 11), and was "squarely put to the [Tribunal]" (per Mr Edey KC).

    (4) Mr Edey KC accepted that the part of the Counterfactual Case that there was no loss because the Management Agreement would have been terminated in any event is not referred to anywhere in the Award ("It's not in terms, no. It's not") and also that the Tribunal never say that Kazakhstan had failed to prove that the Management Agreement would be terminated in any event ("They don't, no").

    (5) If the Tribunal "completely overlooked" (per WWM's Skeleton Argument at paragraph 11) / "entirely ignored" / "entirely disregarded" (per Mr Edey KC's oral submissions) the Counterfactual Case WWM accepted that there will be "substantial injustice" within

the meaning of section 68. This itself is a recognition that if the Tribunal did not "deal" with the Counterfactual Case, then there will be "substantial injustice" within the meaning of section 68.

F.2 Was the Counterfactual Case an "Issue" within the meaning of Section 68(2)(d)?

72. As identified by the Privy Council in *RAV Bahamas*, there is a distinction to be drawn between "issues" on the one hand and "arguments", "points", "lines of reasoning" or "steps" in an argument. Crucially for present purposes, a matter will constitute an "issue" where the whole of the applicant's claim could have depended upon how it was resolved, such that "fairness demanded" that the question be dealt with (see *RAV Bahamas* at [40]).

73. Accordingly, in accepting that the Counterfactual Case was an "issue", WWM thereby (rightly) acknowledges that the whole of WWM's claim (for loss) could have depended upon how the Counterfactual Case was resolved such that fairness demanded that the question be dealt with.

74. This concession, and in particular the concession that the whole of the Counterfactual Case is an issue (the part before and the part after the "since") is important, because (for example) the consequence is that fairness demands that the part after the "since" be dealt with – i.e. that but for the Export License Breach the Management Agreement would still have been terminated and WWM's investment in TGK would still have been lost in any event.

75. It follows, that by its very nature the issue is "very important" and "the centrepiece" of Kazakhstan's argument, being "definitive"/"determinative", and it was an "essential", "key", "crucial" matter upon which Kazakhstan's defence was predicated. These are all descriptions which recognise that "the whole of the applicant's claim could have depended upon how it was resolved" (per *RAV Bahamas* at [40]). If made out, it was a complete answer to the claim for loss. As Mr Edey KC rightly acknowledged, "if the Tribunal had reached that conclusion that it would have been terminated in any event then I accept it would be very difficult for the Tribunal to reach the conclusion that loss was caused by the relevant breach".

76. I am satisfied and find that the Counterfactual Case was an "issue" which "fairness demanded" should be dealt with (per *RAV Bahamas* at [41]).

77. I note, in this regard, that HHJ Pelling QC before me, himself clearly regarded the Counterfactual Case as being one that fairness demanded be dealt with (at [53]-[54]):

> "… it would be necessary for WWM to prove what loss had been caused on the basis of the findings made by the tribunal in relation to breach including in particular that WWM did not have any rights to the Southern Mines and [Kazakhstan] was entitled to terminate the Management Agreement. Had this exercise been carried out the tribunal might well have reached a different conclusion from that it reached in paragraph 587 of the Award, particularly in light of the defendants' stance concerning the importance of the Southern Mines to the overall viability of the investment as a whole as summarised earlier in this judgment. That WWM did not have any rights in relation to the Southern

> Mines may well have a substantial impact given that it was WWM's own case that without access to the Southern Mines the whole project was fundamentally loss making. It may well have been loss making whether or not the export license sought had been granted as and when it should have been granted".
>
> …
>
> "This may involve a careful investigation into what profits might have been made had an export license been granted as sought. How those profits would have impacted on the losses apparently being made would involve some complexity as would the impact of such profits on WWM's breach of the Management Agreement and [Kazakhstan's] ability to terminate the Management Agreement. Had [Kazakhstan] been given the opportunity to consider and make submissions about these points, the tribunal might well have reached a different conclusion from that which it reached, perhaps after giving further directions for the preparation of evidence and submissions focusing on such issues".

F.3 Was the Counterfactual Case "Put to" the Tribunal?

78. As recognised by Aikenhead J in *Raytheon* (at [33(g)]), there is a degree of overlap between the considerations relevant to whether there is an "issue" and whether it has been "put to" the tribunal. As he states (and as is quoted with approval in *RAV Bahamas* at [42]):

> "It is necessary to consider the arbitration proceedings as a whole, including the pleadings and the written and oral submissions. Having done do, in general, what is required is that the tribunal's attention has been sufficiently clearly drawn to the issue, as one which it is required to determine, that it would reasonably be expected to deal with it".

79. WWM rightly accepts that the Counterfactual Case was "put to" the Tribunal, and so this requirement is satisfied. However it is important to understand that the Counterfactual Case was not simply an "issue" that was "put to" the Tribunal (as one of many issues put to the Tribunal). Rather it was the centrepiece (as Mr Edey KC put it) of Kazakhstan's defence in the Remitted Proceedings. It was an "essential issue" to use the language of the Privy Council in *RAV Bahamas* (at [43]).

80. When considering whether there has been a failure by the Tribunal to deal with an essential issue (the third question as addressed in Section F.4 below) that involves a fair, commercial and commonsense reading (as opposed to a hypercritical or excessively syntactical) reading of the award in question):

> "in the factual context of what was argued or put to the tribunal by the parties (and where appropriate the evidence) (*Ascot Commodities v Olam* [2002] CLC 277 … The court can consider

> the pleadings and the written and oral submissions of the parties to the tribunal in this regard".
>
> (emphasis added)

81. It is therefore important (for the purpose of the third question and whether the Tribunal dealt with the essential issue that is the Counterfactual Case) to identify the factual context of what was argued or put to the Tribunal by the parties, having regard to the pleadings, the evidence and the written and oral submissions of the parties. When that is done (as addressed below) it will be clear that the Counterfactual Case was at the very heart of the pleadings, the evidence, the Oral Hearing, and the written and oral submissions of the parties, which is the factual context in which the Award is to be read when considering whether the Tribunal has dealt with the essential issue that is the Counterfactual Case.

82. In this regard:

(1) Kazakhstan's preliminary submissions included:

> "B. The Respondent's intended case as to the Export License Breach
>
> …
>
> (a) The Export License Breach did not cause the total loss of [WWM's] investment (or any loss), because even if it had not occurred, [WWM Parties'] investment would have failed in any event
>
> …
>
> 18. … The Management Agreement would therefore still have been terminated by GKI on or around 1 August 1997, and (as the Tribunal has found) this would not have breached the Treaty.
>
> 19. With respect to causation … since [WWM Parties] would have lost their investment even in the But For Situation, it follows that no injury was caused to [WWM Parties] by the Export License Breach".

(2) Kazakhstan's Counter-Memorial on Causation and Quantum dated 22 October 2021 included:

(a) The contents page identified the counterfactual scenarios at Chapter 4: Counterfactual Scenarios. This ended with "(7) Even in the Counterfactual Scenario, the Management Agreement would have been terminated in any event".

(b) Paragraph 5 of the Counter-Memorial summarised the argument:

> "5. These remitted proceedings ultimately concern *what would have happened but for each of the Export License Breach and the Bankruptcy Breach*. The Tribunal is to ascertain, on the evidence, the hypothetical state of affairs that would have existed

> if the relevant breach had not occurred (the "Counterfactual Scenario"). This is then to be contrasted with what has in fact occurred (the "Actual Scenario"). Here, the Respondent shows that but for the Export License Breach, the evidence establishes that the Claimants would have lost their investment in TGK in any event, because the Claimants would have lacked the means, resources, and will to remedy their (considerable) defaults under the Management Agreement and avoid its termination in August 1997 *even if* the export license had been granted".

(c) Paragraph 6 of the Counter-Memorial identified the legal test to be applied by the Tribunal:

> "[i] the establishment of the breach, followed by
>
> [ii] the ascertainment of the injury caused by the breach, followed by
>
> [iii] the determination of the appropriate compensation for that injury"

(d) Paragraph 7 of the Counter-Memorial then summarised Kazakhstan's case on causation.

(3) Kazakhstan's Rejoinder on Causation and Quantum dated 13 May 2022 set out the issues for determination. The background to the Rejoinder was identified by Mr Harris KC, which was that Kazakhstan had not felt that the Reply from the WWM Parties fully engaged with its case, and so it attempted to set out the key issues for determination for the Tribunal with cross-references to the key passages in the parties' pleadings, the key arguments and legal authorities. In this regard:

(a) Chapter 5 of the Rejoinder contained a list of issues (and sub-issues) in respect of causation as regards the Export License Breach. Issue 12(6) set out the issue and Kazakhstan's answer to it: "Would the Management Agreement have been terminated in any event? Yes; the Claimants were already in default of the Management Agreement even before the Claimants' Date of Breach and had no prospect of remedying those breaches".

(b) Kazakhstan's Counterfactual Case is addressed at Issues 11-13 which address its case that the Export License Breach was not a cause of the demise of WWM Parties' investment. Thus:

(i) Issue 11 identifies PwC expert evidence on financing in respect of:

> "(1) What were TGK's monthly funding requirements? … (2) What was the extent of Claimants' arrears under the management agreement? … (3) Had the Claimants already decided to cease advancing further funds to TGK?".

(ii) Issue 12 identifies:

> "(1) When would the export license for the CE Contract have been granted?". This issue was dealt with. Then, "(2) Would the Claimants have been able to fulfil the CE Contract? (3) … Would the Claimants have been able to secure the necessary financing to enable their investment to survive? … (4) Would the Claimants have successfully negotiated a joint venture in relation to the Southern Mines, as contemplated by the Strategic Alliance Agreement? … (5) Without any joint venture for the exploitation of the Southern Mines, would the Claimants have continued to finance their investment in Kazakhstan? … (6) Would the Management Agreement have been terminated in any event?".

(4) The Remitted Proceedings culminated in the five-day Oral Hearing before the Tribunal with both evidence and submissions. Kazakhstan's Counterfactual Case was the focus of its written and oral submissions and evidence on causation. In this regard, three out of the five days of the Oral Hearing included oral evidence and cross-examination of experts in financing and uranium. The experts for financing were PwC (for Kazakhstan) and Accuracy (for the WWM Parties). The experts in relation to uranium were Wardell Armstrong (for Kazakhstan) and the Uranium Experts (for the WWM Parties). The PwC and Wardell Armstrong experts addressed Kazakhstan's case on the counterfactual and the matters within the Counterfactual Case. In this regard:

(a) PwC's expert report dated 22 October 2021 contained a section headed "The financial position of WWM and TGK in the actual and counterfactual scenarios". At para 4.4, PwC addressed WWM's debts as at the parties' respective dates of breach. It concluded its analysis at 4.14. Paragraph 4.16 addressed WWM's working capital position and concluded at paragraph 4.17 that "[i]n the space of less than 2 months WWM's net working capital had declined by 2.65 million from $3.7 million to $1.1 million". At paragraph 4.18 onwards, PwC addressed WWM's ability to meet its obligations, observing at paragraph 4.21 that, as shown in the table, just taking into account of WWM's payroll commitments, it would have run out of money by June 1997. At paragraph 4.24, PwC explained that:

> "As at either date of breach, WWM did not have sufficient funds to be able to pay any more of its schedule 4 commitments, some of which were already overdue, the future wages, … or amounts due to WWM or TGK's other creditors".

From 4.27 onwards, PwC analysed whether WWM had access to the funds necessary to meet its obligations, looking at what the WWM Parties put forward as to how they were going to get the money and assess this. At 4.36, PwC analysed the ability to raise finance, concluding that WWM was unlikely to be able to raise finance for TGK alone. The impact of receiving an export license was analysed at paragraph 4.39. PwC then concluded that

> "… given my analysis of WWM's financial situation, in my opinion it seems likely that it would have run out of money regardless of whether or not it received the export license and so

> its ultimate financial position in both the Actual and Counterfactual Scenarios would be the same".

(b) Wardell Armstrong's report addressed, amongst other matters, whether WWM could fulfil the CE Contract. At paragraph 111, the report provided a summary that:

> "It appears unlikely that the stockpiled ore could have been processed in sufficient quantity to fulfill the CE Contract and that significant costs would have been incurred in any attempt to do so".

Dr Newall's evidence was that given the nature of the ore it would have cost a great deal to process it, to get it to the standard it needed to be for supply under that contract. So, WWM needed a lot of money to do that, and it is not clear whether they would have been able to process enough of it, or whether there was enough of it.

(5) The Tribunal itself asked specific questions of the parties related to Kazakhstan's Counterfactual Case on which it invited closing oral submissions (and such oral submissions were provided).

83. In the above circumstances, there can be no doubt whatsoever that the "issue" (the Counterfactual Case) was "put to" the Tribunal. However the matters identified above are of particular importance not only in showing that the "issue" was "put to" the Tribunal but because they form the factual context of what was argued and put to the Tribunal by the parties, for the purpose of considering whether the "issue" was "dealt with" by the Tribunal in circumstances where (as shall be seen) none of this (for example in terms of the PwC and the Wardell Armstrong evidence) is dealt with, in paragraph 293 or indeed anywhere in the Award, in the context of the Counterfactual Case.

F.4 Did the Tribunal "Fail to Deal With" the Counterfactual Case?

84. In order to determine whether the Tribunal failed to deal with the Counterfactual Case it is necessary to undertake a fair, commercial and commonsense reading of the Award as a whole in the factual context of what was argued before the Tribunal as identified above.

85. In this regard, whilst each of paragraphs 268 and 293 were at the heart of the submissions before me, it was common ground that it was necessary to have regard to the Award as a whole. It is to that I will now turn, before addressing each of paragraphs 268 and 293.

F.4.1 *The Structure of the Award*

86. The Award runs to some 427 paragraphs over 174 pages. It is divided into 8 Sections: Section I (Introduction), Section II (Procedural History), Section III (Requests for Relief), Section IV (Scope of Matters Remitted), Section V (Causation), Section VI (Quantification of Loss), Section VII (Costs) and Section VIII (Disposition). Of most direct relevance is Section V (Causation).

87. In Section I (Introduction) it is stated at paragraphs 3 and 4 as follows:

> "3. On 23 November 2020, the English High Court granted an application of 26 November 2019 by Respondent under Section 68 of the English Arbitration Act 1996, setting aside certain paragraphs of the Final Award, and remitting to the Tribunal the determination of "all issues concerning causation and the quantification of loss referable to the findings of breach made by the Tribunal in the [Final] Award".
>
> 4. Pursuant to proceedings conducted in accordance with directions issued in consultation with the Parties (the "Remitted Proceedings") the Tribunal in this present Award determines those matters remitted to it. This Award is to be read together with the Tribunal's Final Award, and in the light of the Order of the English High Court dated 23 November 2020."

88. Paragraph 3 footnotes the Pelling Judgment and paragraphs 1 to 3 thereof. It is clear throughout the Award (as WWM accepted before me), that the Tribunal had read, and was aware of the contents of, the Pelling Judgment as a whole.

89. At paragraphs 73 to 74 (as part of Section II: Procedural History) there is a reference to the parties' experts "for examination at the hearings to be held on 11-15 July 2022" (i.e. at the Oral Hearing).

F.4.2 *Section IV of the Award*

90. The Tribunal sets out the scope of the matters remitted in Section IV. The Tribunal begins by recording the parties' submissions and sets out the dispute. It summarises WWM's and Kazakhstan's positions. There then follows the Tribunal's analysis of the issue. These paragraphs are not the subject of the section 68 challenge, but are illustrative of the approach adopted by the Tribunal to such issues, which stretches over 51 paragraphs and 23 pages of the Award. It is to be contrasted with Section V, and the very short part thereof, that actually addresses causation.

91. At paragraph 222, the Tribunal sets out the "central task for this Tribunal" by reference to the Pelling Order (at [2]), in the following terms which are of importance given the Tribunal's own characterisation of its "central task":

> "222. The central task for this Tribunal, as succinctly laid out in paragraph 2 of the High Court Order, is 'the determination by new and/or existing evidence of all issues concerning causation and the quantification of loss referable to the findings of breach made by the Tribunal in the Award".
>
> (emphasis added)

F.4.3 *Section V of the Award (Causation)*

92. Section V of the Award is titled, "Causation". It is then broken down into sections A to J. Section A (commencing at paragraph 228) states as follows:

> "A. The Tribunal's task; breach
>
> 228. The Tribunal can thus proceed to its central task as described in paragraph 222 above, namely 'the determination … of all issues concerning causation and the quantification of loss referable to the findings of breach made by the Tribunal in the Award.' It goes without saying that the starting point for that determination must be the Tribunal's findings of breach as set out in the Final Award. This is a matter purely of identification. The findings themselves are not open to challenge or dispute; they are res judicata, and were treated as such in the High Court Judgment".

93. Between paragraphs 228 and 230, having clarified negatively as well as positively, the substance and nature of the relevant breaches it is then stated that, "the Tribunal can proceed to its central task as set out above".

94. Section B is headed, "the establishment of the Claimants' injury". It is then stated at paragraphs 232 and 233 as follows:

> "232. The Tribunal begins with the existence and extent of any injury to Claimants flowing from these breaches, bearing in mind that this is one of the matters on which the burden of proof rests squarely on the Claimants. The High Court Order uses the term 'loss', but the Tribunal understands this term, read in the light of the Judgment, as referring generally to all forms of legally relevant injury or damage, with the term 'loss' indicating only that what is in question is exclusively injury or damage of a directly quantifiable kind.
>
> 233. The establishment of the injury actually suffered is the necessary starting point; without it, there is nothing on which to hang an enquiry into causation or quantum. A claimant must, in other words establish – as a question of fact – that it did indeed suffer the injury on which it bases its claim. It must then establish – as a mixed question of fact and of law – that that specific injury was caused by the respondent's specific breach, and was not too remote from that breach".

95. The Tribunal then identifies the three-step approach identified in the *Pey Casado (Resubmission)* award (that both parties relied upon), namely:

> "the assessment of the reparation due under international law for the breach of an international obligation consists of three steps – the establishment of the breach, followed by the ascertainment of the injury caused by the breach, followed by the determination of the appropriate compensation for that injury".

96. The Tribunal then continued:

> "As can be seen, the second of those three steps is 'the ascertainment of the injury caused by the breach.' It might however be said that this phrasing in fact conflates two ideas: identifying the injury and, having done so, then verifying its causation. The immediately following paragraph in Pey Casado states this more precisely: "…the injury in question has to be that caused by the specific breach. … What must be proven is both the existence of an injury to the claimant and that that particular injury is the sufficiently proximate consequence of the specific breach." This is at all events the approach which this Tribunal will adopt".

97. At paragraph 234 (to which reference is made back in paragraph 293), the Tribunal identified that the question may be raised whether WWM's injury had not already been determined in the Tribunal's Final Award before noting that it had not and, "[a]t all events, the absence of a specific finding as to the injury suffered is what the High Court identified as deficient in the Final Award".

98. At paragraph 235 of the Award the Tribunal then noted that:

> "In the previous Merits Phase [WWM Parties] cast very widely the extent and nature of the injury or injuries they claimed to have suffered. That corresponded in turn both to the scope of what they claimed to be their protected investment and the wide range of BIT breaches … As just indicated, the rejection of most of those claims in the [2019 Award], notably as to the scope of [WWM Parties'] investment and the expropriation claim, means that they must reformulate root and branch what they now assert as their injury, so as to link it to the Tribunal's findings of breach, but not to go beyond that.
>
> As stated in the High Court Judgment (at paragraph 11), "any damages would have to be quantified by reference to the breaches in fact proved. Any claim based on the assertion that the sum of the conduct complained about amounted to expropriation had been rejected".

99. At paragraph 236 of the Award, the Tribunal stated that, "[t]he Judgment and Order, therefore, set the framework and limits for what is open to the [WWM Parties] to claim in this resumed phase of the arbitration".

100. The Tribunal then proceeded to summarise the three elements of injury ultimately asserted by WWM in the Remitted Proceedings:

> "(i) destroying the very essence and purpose of [WWM Parties'] investment, namely to export and to sell Kazakhstani uranium in the global market; (ii) destroying [WWM Parties'] reputation in the uranium market, and so depriving WWM of access to need revenue from trading activities; and (iii) nullifying WWM's ability to access debt financing or attract equity investors".

101. It was noted that WWM had sought to argue that a paragraph in the Final Award (paragraph 391), and in particular a sentence in that paragraph to the effect that WWM's "inability to obtain an export license effectively doomed the investment" was "a definite determination which should control the issues of injury, causation and quantum, at least so far as concerns the export license breach". The Tribunal rejected this interpretation and made clear that the Final Award did not make "any sort of legal judgment on what injury was caused to [WWM Parties] by the export license breach, nor on the appropriate remedy for it. … Paragraph 391 is thus of no determinative significance for the issues the Tribunal must now decide".

102. At paragraph 244 (in Section D: Injury and Damage"), the Tribunal stated, amongst other matters, as follows:

> "a. There is no room in the law governing international investment for a freefloating concept of 'injury'. The injury must be shown to result from the particular breach, and the connection between the breach and the injury must satisfy the law's requirements as to causation. The onus of establishing both of these elements on the basis of appropriate evidence lies, in the usual way, with the claimant as the party advancing the injury".

103. The Tribunal noted at 244(c) that the form of the reparation awarded by a tribunal will be that found appropriate, in both its positive and negative sense, to the nature of the breach found to have taken place. In this regard the Tribunal then stated in relation to breach of a FET obligation as follows (at 244(c)(ii)):

> "ii. breach of the FET obligation consists by definition in a finding of treatment that was 'unfair' or 'inequitable'; there is nothing absolute about this, it requires the exercise of a measure of judgement by the tribunal in ascertaining its existence and extent from case to case".

104. The Tribunal then stated as follows at paragraph 245, rejecting the notion that causation was synonymous with general expressions such as "followed in the wake of" or "was suffered by" (foreshadowing its subsequent rejection of WWM's case in the same vein that it need only show that the Export License Breach was "a" cause of loss):

> "245. Within that framework, the Tribunal will now consider what injury was 'caused' to the Claimants by the export license breach. The term 'caused' has been put in quotation marks principally because the Parties have found themselves fundamentally at odds over the correct approach to be taken in establishing causation. But it serves also to signal that 'causation' in this context is a term of art. As the citations above from the Pey Casado (Resubmission) award show, it is not synonymous with general expressions such as 'followed in the wake of' or 'was suffered by'".

105. In Section E (entitled "causation in international law"), the Tribunal then addressed WWM's position and Kazakhstan's position (as to a two part or two-stage approach) as to

causation and in each case thereafter rejected their position before (as shall be seen) setting out the true position in paragraph 268, which did include a counterfactual analysis by way of rebuttal of a claimant's case (as advocated by Kazakhstan).

106. At paragraph 246 and following the Tribunal set out WWM's position. WWM contended that the test of causation has two parts. It submitted that the first part involved looking at whether the state's wrongful conduct played, "some part in or was a cause of the injury", it being submitted that "the wrongful conduct need not have been the only cause or even the main cause, and that it suffices for it to have been a cause". It submitted that the second part involved a "legal analysis of whether the wrongful act is sufficiently linked to, or is a proximate cause of, the injury".

107. At paragraph 252 and following the Tribunal set out Kazakhstan's position. It was noted that Kazakhstan concurred with WWM that the test of causation under international law has two elements: a factual element and a legal element. It noted that according to Kazakhstan, the Tribunal must "construct the Counterfactual Scenario, and identify 'the situation which would, in all probability, have existed if [each of the Export License Breach and the Bankruptcy Breach] had not been committed", in order to ascertain the injury – if any – that was caused by each breach". This is the first reference to a counterfactual scenario, but it is in the context of Kazakhstan's two element approach.

108. Under the heading the "Tribunal's Analysis", the Tribunal first summarises, at paragraph 260, WWM's two elements of a factual element and a legal element, and WWM's contention that, under the applicable principles of international law, it is enough for the breach to be no more than "a" cause of the injury. At paragraph 261 the Tribunal then summarises Kazakhstan's two-stage approach:

> "261. The Respondent, for its part, also accepts a two-stage approach to the question, consisting of a factual test followed by a legal test. It submits that, in the first stage, what injury (if any) has been caused by a breach is most naturally established via what it terms a counterfactual scenario. This involves identification of the situation that would, in all probability, have obtained had a given breach not been committed, which is then compared with the actual situation following the breach, the difference between the two representing the injury. The second stage then tests the proximity or remoteness of the injury so established to its causative event(s). Therefore, says Respondent, "[t]he Tribunal's first (and principal) task in these Remitted Proceedings is accordingly to construct the Counterfactual Scenario…".

109. Pausing at this point, it is clear that what the Tribunal is addressing is WWM's "two element approach" and Kazakhstan's "two-stage approach". It is not (for example) addressing whether a counterfactual scenario is of relevance to the question of causation (it clearly is as the Tribunal was to go on to find at paragraph 268).

110. This explains what the Tribunal then says at paragraph 262. "The Tribunal is not able to endorse either of these two approaches". Mr Edey KC sought to submit that the Tribunal thereby rejected the relevance of a counterfactual to causation in international law. That

submission is untenable. It is perfectly clear that what the Tribunal was not able to endorse was "either of these two approaches" (my emphasis). Thus it was not able to endorse WWM's two element approach (a factual element and a legal element) or Kazakhstan's two stage approach (a factual test followed by a legal test). It was not rejecting the relevance of a counterfactual to causation in international law. On the contrary it was in due course (in paragraph 268) to recognise the relevance of a counterfactual to causation in international law.

111. In paragraphs 263 to 267 the Tribunal explained why it could not endorse WWM's approach to causation, stating (at paragraph 263) that it was "wholly unpersuaded by [WWM's] theory of causation, according to which even the most minor contribution to injury or damage would in principle give rise to liability for anything that follows, seemingly on the basis of *post hoc ergo propter hoc*" (i.e. it follows therefore it is caused), the Tribunal thereby rejecting WWM's "a" cause argument, before (in Section F at paragraphs 266 and 267) rejecting WWM's reading of the principle of full compensation.

112. The Tribunal then deals with the relevance of a counterfactual test in Section G at paragraph 268, and (as already addressed above) far from rejecting a counterfactual test, recognises the appropriateness of such a test. For ease of reference I will set it out again at this point (with numbering for ease of discussion):

> "**[1]** As to the Respondent's position, the Tribunal accepts that it may in appropriate cases be convenient to apply a counterfactual test to help determine the existence of injury and its cause, after which a remoteness test might be applied to distinguish between compensable damage and damage that is too remote. **[2]** The Tribunal is not however persuaded that international law lays down as a fixed requirement a two-stage process consisting of those elements. **[3]** The true position is, as the Tribunal has already remarked, that on standard principles it is the claimant who must prove, by appropriate evidence, the loss or damage for which it claims. That is best regarded as one single process which may, according to particular circumstances, involve considerations both of injury and its causation, and of proximity. Once a claimant has produced its evidence and presented the conclusions it draws from that, the respondent may of course set out to rebut them by whatever means it chooses, which may well include in an appropriate case a counterfactual analysis designed to question whether the alleged injury was in fact suffered, or whether it was in fact caused by the alleged breach. **[4]** The adjudicator will then decide the issues in dispute on the basis of the evidence and argument presented. **[5]** But, and especially in respect of alleged breaches of the FET guarantee, these are matters involving a measure of evaluation and assessment, and not the application of rigid rules."
>
> (emphasis added)

113. It will be seen that set in the context of the preceding paragraphs (as addressed above) it is even clearer that the Tribunal did not reject a counterfactual test, but rather rejected Kazakhstan's two-stage approach (a factual test followed by a legal test) and then set out the correct approach (the "true position") in relation to causation, and identified the role that a counterfactual analysis has in that regard in rebutting a claimant's case on causation and loss, before setting out the Tribunal's Route Map: that the Tribunal will then decide "the issues in dispute on the basis of the evidence and the arguments presented" (the central argument being advanced by Kazakhstan, of course, being the Counterfactual Case).

114. As I have already foreshadowed, I am satisfied in this regard that Kazakhstan's construction of paragraph 268 is the correct construction, and that WWM's construction is wrong and does not reflect what the Tribunal says, and finds. Most importantly, for the debate as to whether the Tribunal does deal with the Counterfactual Case (specifically at paragraph 293) the Tribunal does not reject the relevance of a counterfactual analysis or the Counterfactual Case in paragraph 268 and indeed (correctly) recognises that a respondent is entitled to raise a counterfactual analysis which Kazakhstan of course did in its written submissions, in its evidence, and in its oral submissions at the five day Oral Hearing, and (importantly) the Tribunal made clear that it would then "decide the issues in dispute on the basis of the evidence and argument presented" (i.e. the Route Map). In this regard, and as has now been addressed above, the "evidence and arguments presented" indisputably included the Counterfactual Case (indeed the Counterfactual Case was at the very heart of the evidence and Kazakhstan's case and argument and was a major issue, if not the key issue, to be dealt with).

115. Seen in context of what precedes paragraph 268, the correct construction of paragraph 268 does not change, and is even clearer. In this regard paragraph 268 has five identifiable elements (as numbered above):

(1) In the first sentence at **[1]** the Tribunal refers to Kazakhstan's position (which had been identified at paragraph 261) and involved a two-stage process of a factual test followed by a legal test (which it is to come on to reject at **[2]**), but then (importantly) the Tribunal endorses the fact that it may in appropriate cases be convenient to apply a counter factual test to help determine the existence of injury and its cause after which a remoteness test might be applied to distinguish between compensable damage and damage that is too remote.

(2) At **[2]**, the Tribunal then rejects a fixed requirement as to a two-stage process (i.e. a factual test followed by a legal test as had been advocated by Kazakhstan as identified at paragraph 261).

(3) At **[3]**, (and importantly) the Tribunal then sets out what it considers as the "true position" (which is undoubtedly right as a matter of international law and would also be apposite had the matter been governed by English law), namely the claimant must prove by appropriate evidence the loss or damage for which it claims (which may involve considerations of both injury and causation and of proximity) and present the conclusions it draws from its evidence; the respondent may then seek to rebut them by whatever means it chooses, which may well include in an appropriate case a counterfactual analysis designed to question whether the alleged injury was in fact suffered, or whether it was in fact caused by the alleged breach. The present case was indisputably "an appropriate case" which did include a counterfactual analysis (in the

form of the Counterfactual Case) which was designed to question whether the alleged injury was in fact suffered or whether it was in fact caused by the breach given that on the basis of such Counterfactual Case Kazakhstan submitted that WWM had suffered no loss as the Management Agreement would have been terminated in any event.

(4) At **[4],** and crucially for the debate before me, the Tribunal then sets out that the adjudicator (here the Tribunal) will "then decide the issues in dispute on the basis of the evidence and argument presented" – i.e., the Tribunal's Route Map, which is both logical, rational and what one would expect of any tribunal. Equally crucial, the "evidence and arguments presented" included, and have at their heart, the Counterfactual Case. Having set out that (conventional and appropriate) Route Map, the Tribunal then have to deal with the evidence and arguments including the Counterfactual Case. As is said by Aikenhead J in *Raytheon* at [33(g)(xi)] which was quoted with approval by the Board in *RAV Bahamas* at [43], "it is up to the tribunal how to structure an award and how to address the essential issues; if the issue does not arise because of the route the tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will not be engaged. However, if the issue does arise by virtue of the route the Tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will be engaged" (my emphasis). In the present case it is indisputable that the issue reflected by the Counterfactual Case does arise by virtue of the route the Tribunal has chosen to follow (the Route Map). This is not a case where the Counterfactual Case does not arise because of the route the Tribunal has followed. I would only add that it is difficult to conceive of any route that the Tribunal could logically follow which would not involve it dealing with the Counterfactual Case, given its central relevance as an issue that was (if demonstrated) fatal to WWM's submission that it had suffered any loss.

(5) At **[5]**, the Tribunal makes clear that, especially in respect of alleged breaches of the FET guarantee, the matters (identified by them) involve a "measure of evaluation and assessment, and not the application of rigid rules" (a phrase also repeated in paragraph 293 and elsewhere). The Tribunal is here reiterating the point it made at paragraph 244(c)(ii) of its Award, and refers to again at paragraph 381 (in the context of quantum) about a breach of the FET obligation consisting by definition of a finding of treatment that is "unfair" or "inequitable" and which requires the exercise of judgement in ascertaining both the existence of a breach and its consequences, there being a measure of discretionary assessment in determining the injury caused and the appropriate means of compensation. Such observations are unobjectionable in the context of FET but, contrary to WWM's submissions, this is not (and cannot be or be read as) a rejection by the Tribunal of the counterfactual analysis that it has only just endorsed the appropriateness of, or the "true position" it has just stated, or the Route Map that it has just said it will adopt. The Tribunal was not thereby disowning, or departing, from all that it had just said in the remainder of paragraph 268; it was not, as it were, "throwing the baby out with the bath water". Equally such "evaluation and assessment" must involve an evaluation and assessment of the evidence (much of which, as addressed above, was directed, on both sides, at the Counterfactual Case). In this regard it is important to bear in mind that the Tribunal had rejected in trenchant terms (at paragraph 263) WWM's theory of causation whereby it sufficed that the breach was only "a" cause of the loss, and in the context of quantum, was to go on to reject (at paragraph 380) a suggestion arising from the Pelling Judgment that WWM's injury might be seen as a "loss of a chance". As a consequence, the Counterfactual Case cannot but arise for

decision on the Route Map, based on the "evidence and argument presented", at the very heart of which, and as WWM accepts, was the Counterfactual Case.

116. It is against the backdrop of such construction of paragraph 268 (and the Tribunal's Route Map) that paragraph 293 stands to be construed.

117. However, it is first relevant to note that at Section H, at paragraph 269 and following, the Tribunal returns to what it had identified at paragraph 237 – namely that WWM asserts a single global "catastrophic injury" with three components:

(i) destroying the very essence and purpose of the [WWM Parties'] investment, namely to export and to sell Kazakh uranium in the global market;

(ii) destroying the [WWM Parties'] reputation in the uranium market, and so depriving WWM of access to need revenue from trading activities; and

(iii) nullifying WWM's ability to access debt financing or attract equity investors

It being said that "Taken severally or jointly, … these had the effect of destroying [WWM's] investment".

118. The Tribunal stated (at paragraph 271) that in relation to each of these components of the asserted injury it would examine whether the existence of that component was made out on the evidence, if so it would determine (again on the evidence) whether the component could be said to have resulted from the breach, and in the light of the outcome for all three components, it would then determine what injury overall was caused to WWM by the breach.

119. The Tribunal then stated (at paragraph 274) that they would address the three components in reverse order. It is relevant to have regard to how the Tribunal dealt with the second and third components, before turning to the three paragraphs in which the Tribunal addressed the first (including paragraph 293) not least because there is a noticeable difference between how the Tribunal addresses matters in relation to the second and third components and the first.

120. The third component (and the first considered) related to WWM's ability to secure or attract financing, and specifically whether it had been made out on the evidence that WWM lost, or was deprived of, that ability in consequence of the Export License Breach. After identifying the evidence that WWM had adduced at the merits phase, and had been evaluated in the Final Award, and the Tribunal's finding that it was "not possible to know whether WWM could have secured financing", the Tribunal considered the evidence that had now been adduced (including the evidence of mining finance and the experts reports on damages by Accuracy and PwC) and concluded that there was little that was new, and found that the matters identified, "serve to show that [WWM] have plainly failed to meet the burden on them of sustaining the third component of the trilogy said to constitute the catastrophic injury caused by the export license breach" (at paragraph 281).

121. It is notable that in relation to this component (and the second as addressed below) the approach of the Tribunal is methodological. It sets out the matter, deals with the parties' submissions, refers back to the evidence, provides its analysis, and concludes on the issue.

In these two components, the question of a counterfactual never arose because the WWM Parties failed to discharge their burden of proof. The Tribunal in each case explicitly stated that the "Claimants have plainly failed to meet the burden on them". As already foreshadowed, this is in stark contrast with the final issue, dealt with in only three paragraphs, and in relation to which it is not stated that Kazakhstan had failed to prove that the Management Agreement would have been terminated in any event (as Mr Edey KC candidly acknowledged in the course of his oral submissions).

122. The second component (namely destroying WWM's credibility and reputation in the uranium markets, thereby depriving WWM of access to needed revenue, not only from the CE Contract, but also from future spot and long-term sales contracts with other purchasers) was also addressed by the Tribunal at paragraphs 282 to 290 of the Award in a methodological fashion, identifying the existing evidence, noting that the new evidence was thin, and concluding that the WWM Parties had "plainly failed to meet the burden on them of establishing the second component of their claim" (at paragraph 290).

123. The Tribunal then dealt with the third overriding component of WWM's asserted injury – that is to say, "destroying the very essence and purpose of their investment" in Kazakhstan – in a mere three paragraphs, of which the first (paragraph 292) merely introduces what WWM is saying the loss is.

124. There is then the single paragraph (paragraph 293), and the specific sentence therein, on which WWM places so much reliance in relation to causation which I will repeat below for ease of reference (including the lettering added by WWM for ease of discussion):

> "Reverting to paragraphs 234 and 271 above, **[A]** the Tribunal must now give its attention to the question, what injury was caused to the Claimants' investment in Kazakhstan by the export license breach? **[B]** It is incontestable that the export license breach cannot be found to be either factually or notionally a confiscation of the Claimants' investment. That would be incompatible with the Tribunal's res judicata finding that Respondent's termination of the Management Agreement was not in breach of the BIT, not to mention its finding of no expropriation (paragraph 9 above). **[C]** Nor is it open to question that Claimants' investment was already at serious risk of failure by the time of the export license breach. This is so whichever is taken to be the date of breach (see further, paragraphs 396-400 below). **[D]** The Parties vigorously disputed whether timely grant of an export license would have remedied this situation. **[E]** However, no license was in the event granted, making the failure by Respondent to respect the FET guarantee in its handling of Claimants' export license applications a decisive factor that, together with others, caused the investment's eventual demise. **[F]** As already laid down in paragraphs 244 and 268 above, the determination by the Tribunal of the injury and damage caused by this breach of the FET guarantee are matters involving a measure of evaluation and assessment, not the application of rigid rules. **[G]** On that foundation, the Tribunal will now consider afresh what remedy is warranted to redress the

> Claimants' injury, on the strength of the 'new and/or existing evidence of all issues concerning causation and the quantification of loss' as referred to in paragraph 2 of the High Court Order".
>
> (emphasis added)

125. I have already noted that it might be thought to be quite remarkable that in a 427 paragraph Award running to some 174 pages, the Tribunal addresses the question of causation and loss in one paragraph (paragraph 293), and even more than that, that each party places particular focus on one sentence therein (highlighted in bold at letter **[E]**) as to where, if at all, the Tribunal dealt with causation including the Counterfactual Case (albeit construed with regard to paragraph 293 as a whole and indeed the Award as a whole).

126. Sight should not be lost of the fact that section 68 is all about "due process" and in this regard there will be a failure to deal with an "issue" where the determination of that "issue" is essential to the decision reached in the award (*World Trade Corpn v C Czarnikow Sugar Ltd* [2005] 1 Lloyd's Rep 422 at [16]). An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes (*Weldon Plan Ltd v The Commission for the New Towns* [2000] BLR 496 at para 21 (cited with approval in *Raytheon* at [33(iv]) and *RAV Bahamas* at [40]). The Counterfactual Case is indisputably such an issue. Indeed it is the critical issue on causation.

127. I am in no doubt whatsoever that the Tribunal did <u>not</u> deal with the Counterfactual Case either in paragraph 293 or indeed, anywhere else in the Award. In this regard there is no reference to the factual matters that Kazakhstan relied upon, the disputed issues of Kazakh law that were addressed extensively by both parties in expert evidence (both in writing and in cross-examination at the July 2022 oral hearing), the extensive submissions of the parties' uranium experts which addressed (amongst other matters) whether WWM would have been able to fulfil the CE Contract, or the submissions of the parties' quantum experts addressing (amongst other matters) WWM's inability to fund TGK and satisfy its outstanding liabilities. One would expect all such matters to be dealt with as part of addressing the Counterfactual Case.

128. Most fundamentally of all, I am satisfied that the Tribunal simply does not deal <u>at all</u> with the issue of whether the Management Agreement would have been terminated in any event, which is at the very heart of the Counterfactual Case. Yet further, and far from there being any statement to the effect that the Tribunal did not consider it necessary to determine this issue, or that a determination of a logically anterior point meant the issue did not arise (neither of which can be suggested still less established), the Tribunal has recognised at paragraph 268 that Kazakhstan was entitled to rebut causation by any means it chose, including by a counterfactual analysis, and the Tribunal had then expressly chosen a route (the Route Map) by which it would "decide the issues in dispute on the basis of the evidence and <u>the argument presented</u>" (which *ex hypothesi* inevitably involved dealing with the Counterfactual Case and whether Kazakhstan would have terminated the Management Agreement in any event). Yet the Tribunal simply has not done so, in paragraph 293 or anywhere else in the Award).

129. As for the highlighted sentence on which WWM places so much reliance, namely, "no license was in the event granted, making the failure by Respondent to respect the FET guarantee in its handling of Claimants' export license applications a decisive factor that, together with others, caused the investment's eventual demise", I agree with the submission made by Kazakhstan that this cannot possibly be construed as the Tribunal dealing with the Counterfactual Case. The words "no license was in the event granted" is simply a statement of the actual factual position (and indeed the basis for the Export License Breach itself). It is a given before one even considers the issues on causation that arose to be dealt with by reference to the Counterfactual. This cannot make "the failure by the Respondent to respect the FET guarantee in its handling of Claimant export license" a factor, still less a decisive factor, that caused the investment's eventual demise – that is the very issue the Tribunal was supposed to be dealing with, yet it does not do so in this sentence or anywhere else (not least given that the Tribunal has already (rightly) rejected WWM's case that it would suffice if the Export License Breach was a cause of the loss). Equally, "together with others" cannot possibly be a reference to the Counterfactual Case as on that Counterfactual Case it is a trump card that would have meant that WWM has suffered no loss (so it cannot be a factor that "together with others" causing the demise of the investment), and equally if it was demonstrated it would be a "knock-out" blow to loss being suffered by WWM at all. Weighed in the scales it would, by its very nature, outweigh all other factors.

130. In short, the Tribunal has failed to follow its own Route Map and has failed to deal with the Counterfactual Case. This is not a case where there is any ambiguity, whether in the sentence relied upon by the parties, or in paragraph 293, or in the Award as a whole. Nor is there any issue of "interpretation" of the Award that arises. It is clear that the Counterfactual Case has not been dealt with by the Tribunal.

131. Notwithstanding the skill and eloquence with which the submissions to the contrary were advanced by Mr Edey KC, the reality is that he had thin gruel to work with, and those submissions do not bear examination, still less do they lead to a contrary conclusion. First, WWM are wrong to submit that in paragraph 268 the Tribunal reject a counterfactual analysis. WWM are forced to make that submission for otherwise it is untenable to suggest either that there was no need to deal with Counterfactual Case in paragraph 293 or that the Tribunal did deal with the Counterfactual Case in paragraph 293, however briefly. But (as addressed above), as part of the "true position" as identified by the Tribunal, the Tribunal endorsed a counter factual analysis advanced by a respondent by way of rebuttal (such as the Counterfactual Case here), and then stated (in their Route Map) that it would, "decide the issues in dispute" (of which the Counterfactual Case was the central issue), "on the basis of the evidence and argument presented" (of which there was indisputably much expert evidence and much argument on the Counterfactual Case). Yet it did not do so, whether in paragraph 293 or at all, in circumstances where there was no prior anterior issue rendering it unnecessary to deal with Counterfactual Case, and the Tribunal was required to deal with the Counterfactual Case and yet it did not do so.

132. Secondly, Mr Edey KC's "salami slicing" of paragraph 293 does not provide WWM with any assistance on the question whether the Tribunal dealt with the Counterfactual Case. As to the points made:

    (1) At the outset of paragraph 293 the Tribunal refer back to paragraphs 234 and 271. Paragraph 234 is their rejection of the suggestion that WWM's injury had already been conclusively determined by the Tribunal in their previous Final Award. They were right

to reject that. Paragraph 271 is the paragraph in which they say they would examine whether a component was made out on the evidence and whether it resulted from the breach before determining what injury was caused overall, the Tribunal then identifying (at **[A]**) that the Tribunal must now give attention to the question of what injury was caused to WWM's investment in Kazakhstan by the Export License Breach. That statement was unobjectionable and shows this is the paragraph addressing causation, but that inevitably required the Tribunal to deal with the Counterfactual Case based on the evidence and arguments they had heard.

(2) The Tribunal then (at **[B]**) rightly said that it was incontestable that the export license breach cannot be found to be either factually or notionally a confiscation of WWM's investment. As the Tribunal also rightly pointed out this would be incompatible with the Tribunal's res judicata finding that Kazakhstan's termination of the Management Agreement was not in breach of the Treaty, not to mention its finding of no expropriation (at paragraph 9 of the Award). None of this had anything to do with the Counterfactual Case.

(3) Next, the Tribunal (at **[C]**) stated that "[n]or is it open to question that [WWM's] investment was already at serious risk of failure by the time of the export license breach". This is acknowledging events before the Export License Breach. It is not concerned with the Export License Breach or loss caused by the Export License Breach (or indeed the Counterfactual Case as to events subsequent to the Export License Breach – i.e. that the Management Agreement would in due course have been terminated in any event).

(4) In the sentence at **[D]**, the Tribunal correctly identified that the Parties vigorously disputed whether the timely grant of an export license would have remedied this situation (i.e. WWM's investment being at risk of failing). But the Tribunal is not dealing with the Counterfactual Case and specifically whether Kazakhstan would subsequently have terminated the Management Agreement in any event.

(5) It is in the sentence at **[E]** (if anywhere) that the Tribunal addresses causation. However what is there stated cannot possibly be seen as the Tribunal dealing with the Counterfactual Case. As already addressed, the words "no license was in the event granted" is simply a statement of the actual factual position (and indeed the basis for the Export License Breach itself). It is a given before one even considers the issues on causation that arose to be dealt with. This cannot make "the failure by the Respondent to respect the FET guarantee in its handling of Claimant export license" a factor, still less a decisive factor, that caused the investment's eventual demise – that is the very issue the Tribunal are supposed to be dealing with, yet they do not do so in this sentence or anywhere else (not least given that the Tribunal has already (rightly) rejected WWM's case that it would suffice if the Export License Breach was a cause of the loss).

(6) "Together with others" in sentence **[E]** cannot (as submitted by WWM) be a reference to the Counterfactual Case as on that Counterfactual Case it is a trump card that would mean that WWM has suffered no loss (so it cannot be a factor that "together with others" caused the investment's eventual demise), and equally if it was demonstrated it would be a "knock-out" blow to loss being suffered by WWM at all. Weighed in the scales it would, by its very nature, outweigh all other factors. There is nothing in **[C]** and **[D]** that supports WWM's assertion that the reference to "others" is, and can only

be, a reference to factual matters relied on by Kazakhstan as part of its Counterfactual Case. Nor can it possibly be said that the Tribunal there "dealt with" the Counterfactual Case.

(7) WWM submits that the Tribunal then, at **[F],** provided some further explanation of its approach in reaching its conclusion at **[E].** In fact sentence **[F]** clearly runs together with, and is to be read together with, sentence **[G].** It is looking forward to the assessment of quantum and remedy, on the strength of the "new and/or existing evidence of all issues concerning quantum" which the Tribunal then deals with in Section VI at paragraph 295 and following. The reference back to paragraph 268 is made because that is where the point was made, here repeated (and made again at paragraph 381 in the quantum section), that the determination by the Tribunal of the injury and damage caused by the breach of the FET guarantee are matters involving a measure of evaluation and assessment, not the application of rigid rules. That cannot possibly be seen as a rejection of the "true position" as identified by the Tribunal in paragraph 268 in which the Tribunal endorsed a counterfactual analysis advanced by a respondent by way of rebuttal (such as the Counterfactual Case here), and then stated (in their Route Map) that they would "decide the issues in dispute" (of which the Counterfactual Case was the central issue), "on the basis of the evidence and argument presented" (of which there was indisputably much expert evidence and much argument on the Counterfactual Case both in written submissions and at the Oral Hearing).

(8) In this regard, the fact that the determination by the Tribunal of the injury and damage caused by the breach of the FET guarantee as matters involving a measure of evaluation and assessment, not the application of rigid rules, cannot possibly be seen as the Tribunal reneging on its own Route Map, still less dealing with the Counterfactual Case, not least given that, if the Counterfactual Case is made out, however much there is a measure of evaluation and assessment, WWM has simply suffered no loss. That is why Mr Edey KC stated that "if the Tribunal had reached that conclusion that it would have been terminated in any event then I accept it would be very difficult for the Tribunal to reach the conclusion that loss was caused by the relevant breach". That is the very reason why the Tribunal had to deal with the Counterfactual Case, but it did not do so.

133. WWM also seek to rely upon subsequent paragraphs in the Award to support their construction of paragraph 293. But these amount to no more than reference back to the sentence in paragraph 293 that "no license was in the event granted, making the failure by [Kazakhstan] to respect the FET guarantee in its handling of WWM's export license applications a decisive factor that, together with others, caused the investment's eventual demise", most obviously at paragraphs 417 and the disposition at paragraph 427 which track the very same language:

(1) At 417, "[Kazakhstan's Treaty] breach was a decisive factor among those that led to the loss of [WWM's] investment in Kazakhstan and that, in the circumstances, the appropriate way forward to make good that loss is through an award of sunk costs", and

(2) At 427, "The export license breach constituted a decisive factor that, together with others, caused the eventual demise of [WWM's] investment in Kazakhstan".

134. In neither of these paragraphs does the Tribunal deal with the Counterfactual Case. Equally, simply to say that "[t]he Tribunal has heard the Parties' extensive evidence in these

resumed proceedings" and "having considered together with the new evidence already on record, the new evidence tendered by the Parties" (as referred to in paragraphs 417 and 427) is not to deal with the central issue that was put to it, namely the Counterfactual Case. As was made clear in *Raytheon* at [33(g)(xi)], as approved in *RAV Bahamas* at [43], "if [as here with the Counterfactual Case] the issue does arise by virtue of the route the tribunal has followed for the purposes of arriving at its conclusion, section 68(2)(d) will be engaged".

135. Reliance is also placed by WWM on paragraph 422 in which it was stated, in the context of consideration of the incidence of costs, that "the Tribunal, on the basis of all the evidence, new and old, has not been persuaded that [WWM] suffered no materially assessable loss resulting from [Kazakhstan's] breaches". This was said in the context of considering who was the successful party for the purpose of costs, and the Tribunal just having found (in paragraph 417) that the appropriate measure of loss was WWM's "sunk costs". On that finding WWM were clearly the successful party. In any event, and even postulating (as the Tribunal did) scenarios in which there was a "no damages outcome", it cannot possibly be said that by stating that on the basis of all evidence old or new it had not been persuaded that WWM suffered no materially assessable loss, the Tribunal was dealing (and in a section on costs rather than causation) with the central issue that was put to it, namely the Counterfactual Case (as to which see also *Buyuk*, supra at [38] and *Ascot Commodities N.V v Olam International Ltd* [2002] 2 Lloyd's Rep. 277 at [284] as quoted below).

136. Nor is there any substance in WWM's submission that the Tribunal must have dealt with the Counterfactual Case "implicitly" on the basis that it would have had the Counterfactual Case "well in mind". The relevant factual context was a Counterfactual Case that was ventilated in a five-day oral hearing in front of the Tribunal, with hundreds of pages of submissions, expert evidence, cross-examination of experts and closing submissions on the Counterfactual Case, yet there is not one reference to any of this in paragraph 293, and (fundamentally) no reference whatsoever to the central aspect of the Counterfactual Case as to whether Kazakhstan would have terminated the Management Agreement in any event, an issue that arose, was put to the Tribunal, and the Tribunal had to deal with. It is also to be contrasted with the length and care with which the Tribunal dealt with other components where the Tribunal expressly found that "[WWM] have plainly failed to meet the burden on them", which is in stark contrast with the Counterfactual Case, in respect of which the Tribunal do not state that Kazakhstan had failed to prove that the Management Agreement would be terminated in any event (as Mr Edey KC realistically acknowledged).

137. As was said by Gavin Kealey KC (sitting as a Deputy Judge of the High Court) *Buyuk*, supra at [38], in terms which are apposite in the context of WWM's submission in the present case:

> "It is not sufficient for an arbitral tribunal to deal with crucial issues *in pectore*, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of section 68(2)(b) is to ensure that all those issues the determination of which are crucial to the tribunal's decision are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties

> (normally, as I say, from the Award or Reasons) that those crucial issues have indeed been determined".

138. In the same vein, as was said by Toulson J in *Ascot Commodities N.V v Olam International Ltd* [2002] 2 Lloyd's Rep. 277 at [284], "… an Award should deal, however concisely, with all essential issues". It will be recalled that a matter will constitute an "issue" (for the purpose of section 68(2)(b)) where the whole of the applicant's claim could have depended upon how it was resolved, such that "fairness demanded" that the question be dealt with (see *RAV Bahamas*, supra, at [40]). It is common ground that the Counterfactual Case was such an issue.

139. Mr Edey KC also repeatedly made the *crie de cœur* that it was not likely that an experienced tribunal such as the present Tribunal would fail to deal with the Counterfactual Case or that, in other expressions used by him, the Tribunal would have "fumbled it" or "dropped the ball". Such submissions are commonly, if not invariably, rolled out by a respondent, and prayed in aid as to inherent probabilities, as an attempted rebuttal when it is said that a tribunal has failed to deal with an issue that was put to it. But that is, with respect, to look at matters from the wrong end of the telescope.

140. The reason why the Tribunal went wrong is because it went wrong. Experienced tribunals do fail to deal with issues that are put to them. With the greatest of respect to the eminent arbitrators in this case, even Homer nods, and experience does not bring with it infallibility, and even the most knowledgeable and skilled arbitrators can fall into error or have lapses of judgment. It is because experience shows that tribunals do fail to deal with issues that are put to them that Parliament has legislated that there will be a serious irregularity where there is "a failure by the tribunal to deal with all the issues that were put to it" (in the very words of section 68(2)(d)). This is a statutory recognition (if one were needed) that tribunals do, indeed, fail to deal with important issues that were put to them. Indeed the law reports are replete with examples where a tribunal has failed to deal with an essential issue that was put to it (or where a tribunal has dealt with a case on a basis that the parties have not had the opportunity to address the tribunal on – as indeed has already occurred in the present case in relation to this very Tribunal, with the first reference under section 68(2(a)).

141. The issue is whether, on a fair, commercial and commonsense reading of the Award in the factual context of what was argued by the parties having regard to the evidence and the written and oral submissions of the parties, the Tribunal has failed to deal with the issue (*Raytheon* at [33(g)(xii] as approved in *RAV Bahamas* at [43]). I am satisfied that on just such a reading of the Award the Tribunal has indeed failed to deal with the Counterfactual Case.

142. In the above circumstances it is not necessary to address Kazakhstan's further submission that WWM would not, of its own volition, have written to the Tribunal in the terms they did unless this was a recognition that there was a gap to be filled as a result of the Tribunal not having dealt with an issue that was put to it. Ultimately, it matters not why WWM wrote in the terms it did. It is for the Court to determine whether there has been a serious irregularity.

F.4.4 Conclusion on "Deal With"

143. In the above circumstances, I am in no doubt whatsoever that the Tribunal did not deal with Kazakhstan's Counterfactual Case in the Award. Accordingly, section 68(2)(d) is engaged.

144. In circumstances where there was, I am satisfied, no ambiguity or uncertainty, and there was a clear failure to deal with the issue (the Counterfactual Case), there is no scope for the operation of Article 35 of the 1976 UNCITRAL Rules and no basis for seeking an interpretation from the Tribunal. "Interpretation is not a mechanism for revisiting an issue … that the tribunal should have decided but did not" (Carno and Caplain in their commentary on the UNCITRAL Rules, as quoted with approval by Foxton J in *Diag* at [200]). WWM acknowledge the same at paragraph 58 of their Skeleton Argument.

145. I accordingly reject WWM's submission that Kazakhstan could or should have applied to the Tribunal to provide an interpretation of the Award. The submission that Kazakhstan has failed to comply with section 70(2) of the Arbitration Act 1996 is without substance and is dismissed.

F.4.5 Substantial Injustice

146. It is well established that there will be substantial injustice where, had the irregularity not occurred, the outcome of the arbitration might well have been different. As was said by the Privy Council in *RAV Bahamas* at [34]:

> "34 There will be substantial injustice where it is established that, had the irregularity not occurred, the outcome of the arbitration might well have been different: see, for example, *Vee Networks Ltd v Econet Wireless International Ltd* [2005] 1 All ER (Comm) 303, para 90 (Colman J). It is not necessary to show that the outcome would necessarily or even probably be different: *Cameroon Airlines v Transnet Ltd* [2006] TCLR 1, para 102 (Langley J). As stated by Akenhead J in *Raytheon* [2014] EWHC 4375 (TCC) at [33(i)]:
>
> > "For the purposes of meeting the substantial injustice test, an applicant need not show that it would have succeeded on the issue with which the tribunal failed to deal or that the tribunal would have reached a conclusion favourable to him; it [is] necessary only for him to show that (i) his position was reasonably arguable, and (ii) had the tribunal found in his favour, the tribunal might well have reached a different conclusion in its award . . .".

In the present case, it is indisputable that had the irregularity not occurred the outcome of the arbitration might well have been different – if Kazakhstan's Counterfactual Case were to succeed WWM will have suffered no loss.

147. In fact, the present case is one where the irregularity is so serious that substantial injustice is inherently likely and likely by the very nature of things, and is of the type addressed in *RAV Bahamas* at [35]:

> "35 Some irregularities may be so serious that substantial justice is inherently likely or likely in the very nature of things to result. As Toulson J stated in *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277, 284F—285A:
>
> > "Since the whole process of arbitration is intended as a way of determining points at issue, it is more likely to be a matter of serious irregularity if on a central matter a finding is made on a basis which does not reflect the case which the party complaining reasonably thought he was meeting, or a finding is ambiguous, or an important issue is not addressed, than if the complaints go simply to procedural matters . . . "It is *inherently likely* to be a source of serious injustice if irregularities occurred of the kind to which I have referred. Since the purpose of arbitration is to determine central issues between the parties, if there has been a flaw in that this has not been done, that is *likely in the very nature of things* to be a matter of serious injustice".
>
> (emphasis of the Privy Council)

148. As recognised in *RAV Bahamas* (at [36]) in such cases substantial injustice may be inferred from the nature of the irregularity and that inference may be so strong that "[i]t almost goes without saying" (see *Raytheon* at [61]).

149. WWM accepted that if the Tribunal "completely overlooked" the Counterfactual Case there will be substantial injustice within the meaning of section 68. That was this case. In any event, if that irregularity had not occurred the outcome of the arbitration might well have been different (if the Counterfactual Case had been accepted WWM would have suffered no loss). The reality, however, is that this is one of those cases where the irregularity is so serious that substantial injustice is inherently likely.

150. I am satisfied, and find, that the irregularity has caused Kazakhstan substantial injustice within the meaning of section 68.

G. CONCLUSION

151. If ever there was a case where there was a failure to comply with the due process of the arbitral proceedings by a tribunal failing to deal with a central issue that was put to it, then this was it, with the failure of the Tribunal to deal with the Counterfactual Case. In such circumstances, justice calls out for that serious irregularity to be corrected.

152. Accordingly, Kazakhstan's challenge to the Award under section 68(2)(d) succeeds, and is upheld.

153. The parties were in agreement that if the section 68 challenge succeeded, as it has, they would each wish to address me as to the appropriate relief that should be ordered, and it

was agreed that I should reserve such matters to be dealt with upon the handing down of judgment at which such consequential matters will be dealt with. I accordingly reserve the question as to the appropriate relief to be granted until that time.